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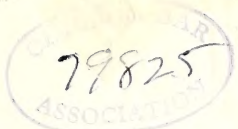








27758  
222 - 27758



229 I.A. 629

W. A. THOMSON,  
Appellee,

vs.

ALEXANDER W. THOMSON, RODERICK  
W. McKINNON, TIMOTHY J. BROSHANAN,  
SELDEN F. WHITE, HARRY L. WINTERS  
and ARTHUR C. DELANY, Copartners  
Doing Business under the Firm Name  
and Style of THOMSON & McKINNON,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

advised

229 I.A. 629

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

This is the second appeal in this case. Upon the first trial the court peremptorily instructed the jury to find for the defendants. We held this was error and reversed the judgment, 220 Ill. App. 486. Substantially the evidence of the first trial was introduced upon the second trial, whereupon the Judge instructed the jury to render a verdict for plaintiff and judgment was entered thereon for \$15,538.50, from which defendants now appeal. Not only was the evidence on the second trial substantially the same as on the first, but the points now presented by respective counsel are also substantially the same. Our views as heretofore expressed determined the law of the case and are applicable to the present record and contentions. For convenience we here quote in full our prior opinion:

"Plaintiff brought suit for moneys claimed to be due him from the defendants on account of a purchase of a quantity of corn. Upon trial the court directed the jury to return a verdict for defendants, and judgment was accordingly entered, from which plaintiff appealed. The appeal was taken directly to the Supreme Court upon the claim that a constitutional question was involved. Defendants moved to transfer the cause to the Appellate Court because no question of the construction of the constitution was

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STATE  
202 - 2770

APPEAL FROM MUNICIPAL COURT

V. A. THOMSON  
Appellee

vs.

ON WRIT

ALEXANDER W. THOMSON, ROBERT  
W. SCHROEDER, TIMOTHY J. SCHROEDER,  
BENJAMIN F. WHITE, ARTHUR J. WHITE,  
and ARTHUR J. WHITE, Co-Defendants  
John Paulson, with the Willamette  
and State of Oregon, Appellants

1962 JAN 11

MR. JEREMYSON JUSTICE, MEMPHIS  
DELIVERED THE OPINION OF THE COURT.

This is the second appeal in this case. Upon the first trial the court apparently instructed the jury to find for the defendant. We held this was error and reversed the judgment. The Ill. App. 180. Subsequently the evidence of the first trial was introduced upon the second trial, whereupon the judge instructed the jury to render a verdict for plaintiff and judgment was entered thereon for \$10,000.00, from which defendant now appeals. Not only was the evidence on the second trial substantially the same as on the first, but the points now presented by respective counsel are also substantially the same. Now again as heretofore expressed disagreement the law of the case and are applicable to the present record and the facts. For convenience we have quote in full our prior opinion:

"Plaintiff brought suit for money claimed to be due him from the defendant amounting to a purchase of a certain lot of land. Upon trial the court directed the jury to return a verdict for defendant, and judgment was accordingly entered, from which defendant appealed. The appeal was taken directly to the Supreme Court upon the claim that a constitutional violation was involved. Defendant moved to dismiss the appeal on the ground that because no question of the constitution of the constitution was



was involved, and this motion was allowed, the reasons moving the Supreme Court appearing in Thomson v. Thomson, 293 Ill. 584.

In this opinion the facts are stated, in substance, as follows:

The defendants are brokers in Chicago and members of the Chicago Board of Trade. The plaintiff, a grain dealer in Louisville, Kentucky, employed defendants on May 23, 1917, to buy for him 10,000 bushels of No. 2 corn for July delivery at \$1.57 1/8 a bushel, and on June 12 to buy 10,000 bushels more at \$1.58 a bushel. The defendants made both purchases, the purchase price for the two lots amounting to \$31,512.50, and on July 31, none of the corn having been delivered, the plaintiff tendered that amount to the defendants and demanded delivery of the corn. The defendants refused to deliver the corn, having previously settled the plaintiff's contracts with the sellers on the basis of \$1.65 a bushel, the price fixed by a committee under the authority of the Board of Trade by virtue of the resolution of July 5, 1917, hereinafter quoted. They informed plaintiff that Clement, Curtis & Company were the sellers, and thereupon plaintiff tendered the purchase price to Clement, Curtis & Company and demanded delivery of them, but they, too, refused. The market price of the corn on that day was \$2.36 a bushel. Clement, Curtis & Company were not the original sellers of the corn, but under the rules of the Board of Trade they were substituted for the sellers and the defendants became guarantors of the ultimate fulfillment of the original contracts. The contracts were made in accordance with and subject to the rules, regulations and customs of the Board of Trade and the rules, regulations and requirements of its board of directors and all amendments that are made thereto. July 5, 1917, the board of directors of the Board of Trade adopted the following resolution:

'Whereas, by reason of the state of war which now exists, it becomes the patriotic duty of all to second the efforts of our government to prevent undue price increase in food products; now, therefore:

4-17-34

was involved, and this matter was allowed, the records showing the  
 Supreme Court appearing in Chicago v. Board of Trade, 233 Ill. 388.  
 In this opinion the Court was stated, in substance, as follows:  
 The defendant was a dealer in Chicago and members of  
 the Chicago Board of Trade. The plaintiff, a grain dealer in  
 Louisville, Kentucky, employed defendants on May 22, 1917, to buy  
 for him 10,000 bushels of No. 2 corn for July delivery at \$1.57 1/2  
 a bushel, and on June 12 to buy 10,000 bushels more at \$1.58 a  
 bushel. The defendants made both purchases, the purchases being for  
 the two lots amounting to \$1,512.50, and on July 21, none of  
 the corn having been delivered, the plaintiff demanded that  
 amount be the defendants and demanded delivery of the corn. When  
 defendants refused to deliver the corn, having previously notified  
 the plaintiff's contract with the seller on the basis of \$1.58 a  
 bushel, the price fixed by a committee under the authority of the  
 Board of Trade by virtue of the resolution of July 5, 1917, herein-  
 after quoted. They informed plaintiff that Chicago & Com-  
merce were the sellers, and that when plaintiff tendered the pay-  
 ment price to Chicago & Commerce and demanded delivery of  
 the corn, but they, too, refused. The market price of the corn on  
 that day was \$1.56 a bushel. Chicago & Commerce were not  
 the original sellers of the corn, but under the terms of the Board  
 of Trade they were substituted for the sellers and the defendants  
 became responsible to the plaintiff for the delivery of the original corn.  
 The contracts were made in accordance with and subject to  
 the rules, regulations and customs of the Board of Trade and the  
 rules, regulations and customs of the Board of Directors and  
 all members that now exist. July 5, 1917, the Board of  
 Directors of the Board of Trade adopted the following resolution:  
 "Whereas, by reason of the state of war which now exists,  
 it becomes the patriotic duty of all to assume the efforts of  
 the Government to prevent undue price increases in food products;  
 and whereas:



'Be it resolved, that after the 5th day of July, 1917, all trading by members of this exchange in corn, for delivery, by grade alone, in Chicago in the month of July, either for immediate or future delivery, shall cease, and any member so trading after said day shall be deemed to have committed a grave offense against the good name of this association.

'Be it further resolved, that the president shall appoint a committee of three from the membership at large, to be approved by this board, who shall proceed at once to determine the true commercial value of the contract grades of July corn in Chicago on the 5th day of July, 1917, and that the price, when so established by said committee, shall be the basis upon which shall be settled all contracts for July delivery open at the close of business on the 5th day of July, 1917, except such open contracts as shall be performed for delivery during the month of July, or shall be settled by the agreement of the parties. Every seller not notifying his purchaser in writing before 1:15 o'clock P. M. July 5, 1917, of his intention to settle his July, 1917, contracts upon the basis of the price thus fixed shall be deemed to have elected to deliver the property; and in case of his failure to deliver, settlement shall be made at the price fixed plus the penalty provided in rule 23, and to this extent the resolution of the board of directors of June 13, 1917, is hereby modified.'

The committee appointed under this resolution fixed the July value of corn at \$1.65 a bushel, and on July 9, Clement, Curtis & Company notified the defendants of their intention to settle the plaintiff's contracts for July corn upon the basis of that price, and the defendants, in spite of the plaintiff's instructions to the contrary, made the settlement, remitting the profits to the plaintiff's Louisville agents.

The Supreme Court further said:

'There is no doubt that the application of the resolution of July 5, to appellant's contracts would impair the obligation of them. Before the resolution the seller was bound to deliver the corn during the month of July, and if he did not he was bound to pay damages, if the price went up, to the extent of the excess of the market price over the contract price. Under the resolution he would not be bound to deliver the corn, and the measure of damages he would be required to pay was the difference between the contract price and \$1.65 a bushel -- the price fixed by the resolution.'

And also:

'If the resolution was inoperative against the appellant its invalidity arose --- because of the lack of power by the board of directors, under the general principles of law in relation to contracts, to adopt it.'

THE FOLLOWING IS A SUMMARY OF THE INFORMATION RECEIVED FROM THE  
OFFICE OF THE ATTORNEY GENERAL, NEW YORK, ON JANUARY 10, 1951,  
RE: THE ABOVE NAMED PERSONS, AND THE RESULTS OF THE SEARCHES  
MADE IN THE OFFICE OF THE ATTORNEY GENERAL, NEW YORK, ON  
JANUARY 10, 1951, AND THE RESULTS OF THE SEARCHES  
MADE IN THE OFFICE OF THE ATTORNEY GENERAL, NEW YORK, ON  
JANUARY 10, 1951.

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THE SECRETARY OF THE ARMY

One of the general principles of law in relation to contracts is that while a corporation may amend its by-laws or adopt resolutions making reasonable changes in its methods of conducting its business, it has no power to make changes which will affect injuriously the rights of strangers. Illinois Conference Female College v. Cooper, 25 Ill. 133; Peterson v. Gibson, 191 Ill. 368; Interstate Building & Loan Ass'n v. Wooten, 113 Ga. 247; Ayers v. Grand Lodge, 138 N. Y. 280; Peck v. Elliott, 79 Fed. 10; Amann v. Hill Union Brewery Co., 59 N. J. Eq. 414; Insurance Co. v. Connor, 17 Pa. St. 136.

It is urged that the Chicago Board of Trade has inherent power at all times to make regulations controlling its members in respect to the manner of conducting the business on the board; that because of conditions arising out of the war, so much grain had been bought as to cause a great increase in the market value, which threatened to go beyond all reasonable bounds; that under such conditions the resolution in question was adopted as a wise and patriotic preventative of unreasonably high prices. Opposing counsel question the altruistic motives of the members of the board in procuring this resolution and insist it was simply a protective measure for the benefit of dealers who were under contract to deliver grain. It is not necessary for us to settle this controverted point. Assuming the reasonableness and propriety of the resolution in so far as it affected the members of the board, the question is: Should non-members or the members be made to pay losses resulting therefrom? It seems a logical conclusion from the general principle stated in the above cases that the stranger who has a contract made prior to the adoption of the resolution should not be compelled to suffer this loss.

Did plaintiff make his contracts of purchase subject to any resolutions or any amendment to the bylaws which the board might







subsequently make? Defendants assert that he did, by the provision which says that all the orders for purchase and sale are made 'in accordance with and subject to rules, regulations and customs of the exchange upon which the order is to be executed, and the requirements of its board of directors and all amendments that are made thereto.' Defendants urge that these last words mean any rule promulgated after the contracts are made. Such a provision will not be construed to relate to subsequent amendments unless it is expressly so stated. Peterson v. Gibson, 191 Ill. 366; Covenant Mut. Life Ass'n v. Kentner, 188 Ill. 431; Baldwin v. Bagley, 185 Ill. 180. The above words, 'and all amendments that are made thereto,' are not express words relating to the future; they are in the present tense. If there is doubt as to this, they must be construed not to apply to amendments made subsequent to the contract. As was said in Annan v. Hill Union Brewery Co., *supra*, 'The court leans against giving the by-laws a retrospective effect. \*\*\* Otherwise, a contract would be anything the directors might, from time to time, choose to make it. The meeting of minds, so necessary to the conception of a contract, would be purely notional.'

Even if these words are construed as including future amendments, they could contemplate only rules and regulations concerning administrative matters and not a regulation depriving the plaintiff of a substantial vested right. Plaintiff could not reasonably anticipate the passage of an extraordinary resolution which undertook arbitrarily to fix the price at which the sellers could settle for the grain bought by plaintiff, regardless of the market price. E. Hess Malting Co. v. Warren, 15 Ill. App. 596.

Much is said of the hardship upon defendants if they had settled with plaintiff at the market price, thereby earning a very small commission, but incurring the penalty of forfeiting



their memberships in the board, which are of large value. Even the danger of such a penalty would not relieve defendants from the operation of rules of law with reference to contracts. However, the resolution permitted settlement by delivery of grain, which was by express terms contemplated by the contract of purchase; so by delivery defendants would have been within the approval of the resolution. If they could not buy for such delivery except at a price involving loss, there is no reason in justice why plaintiff rather than the defendants should be compelled to stand this loss.

The fact that defendants were agents for the plaintiff in making the purchase does not relieve them from liability. The agents had no right to impair plaintiff's contract. Saladin v. Mitchell, 45 Ill. 79; Samuels v. Northrup Ind. Bank, 234 Ill. 9; Flowers v. Bush & Witherspoon Co., 254 Fed. 519.

It is well settled that where one party refuses to carry out the terms of the contract, he may among other things keep the contract alive, himself ready and able to perform, and at the end of the time specified for the performance sue and recover. Lake Shore & M. S. Ry. Co. v. Richards, 152 Ill. 59; Stephen M. Weld & Co. v. Victory Mfg. Co., 305 Fed. 779; Staley v. Lyman, 151 Ill. App. 137.

Plaintiff's counsel attacks the resolution in question as not being within the power of the board of directors to promulgate. It is not necessary for us to pass upon this, for if plaintiff is not affected thereby he cannot raise any question as to the manner of its adoption.

For the reasons above indicated a majority of this court is of the opinion that plaintiff was not affected by the resolution aforesaid; that the defendants were not relieved thereby



10-10-1944

THE UNITED STATES DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
WASHINGTON, D. C. 20250

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from their obligations either to deliver the amount of corn purchased or to settle at the market price; that the resolution impaired in no way contracts between the parties, and that the trial Judge was in error in this respect and should not have peremptorily instructed the jury, but should have submitted the case with proper instructions as to the law as herein indicated.

The judgment is therefore reversed and the cause is remanded."

The present judgment is in accord with what we held in this opinion, to which we still adhere. The judgment is therefore affirmed.

AFFIRMED.

Dever and Hatchett, JJ., concur.



...the ... ..

JAMES McGETTRICK,  
Appellee,

vs.

DAVID J. O'CONNOR, EDMUND BURKE,  
and WALTER McDONNELL, copartners,  
doing business as O'Conner, Burke  
& McDonnell,  
Appellants.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

229 I.A. 629

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against plaintiff for \$1,000, entered upon the verdict of a jury in a suit to recover this amount deposited by plaintiff as earnest money with defendants, who are real estate brokers.

Courtney Gleason as owner contracted to sell to plaintiff an apartment building in Chicago for \$26,000. The contract provided that \$1,000 should be paid by the purchaser (plaintiff) as earnest money, which should be held by the real estate agents, O'Conner, Burke & McDonnell (defendants) for the mutual benefit of both parties, but if the purchaser should fail to perform his obligations under the contract the earnest money should be retained by the vendor as liquidated damages, and it was the duty of the real estate agents in such case to apply the same, first to the payment of any expenses incurred for the vendor by his agent in said matter, and, second, to the payment to vendor's broker of a commission, the overplus to be paid to the vendor.

The vendor agreed to furnish a certificate of title or merchantable abstract of title or a "merchantable title Guaranty Policy, made by Chicago Title & Trust Co., within a reasonable time." Within ten days after receiving an abstract the purchaser should notify the seller in writing of objections, if any, to the



title, and in case material defects were found and so reported, and not cured within sixty days after such notice, the contract should at purchaser's option, become void and the earnest money be returned.

This contract was executed July 1, 1920, by plaintiff McGetrick, and the owner of the premises, Courtney Gleason. Defendants were not parties to it.

The first count of plaintiff's declaration charged that defendants procured plaintiff to sign the contract by deceit and misrepresentations regarding the income the property would bring, alleging that defendants represented that the property would pay plaintiff thirty-six per cent; that in fact it would not do this, hence plaintiff had elected to rescind the contract and demand the return of the \$1,000 earnest money. Plaintiff failed to prove this. He testifies that McDonnell told him he could get thirty-six per cent on his \$5,000, the amount of cash to be paid, and that McDonnell gave him a statement of figures giving an estimate as to income and expenses. There was no proof either that McDonnell knew that his estimate or representations were untrue, or that they were in fact untrue. Indeed, the evidence tends to the contrary, for a witness who purchased the premises the following December testified that she was receiving upwards of forty per cent on her investment.

To sustain the charge of deceit the declaration must charge that the false representations were knowingly made and their falsity must be proven by the preponderance of the evidence.

Gantwell v. Harding, 249 Ill. 354; Holden v. Ayer, 110 Ill. 448; Johnson v. Miller, 299 Ill. 276.

The second count alleges the deposit of \$1,000 earnest money with defendants under the aforesaid contract, but that said Courtney Gleason, with whom the contract was made, did not own the



Reference to FBI report dated 10/10/68 indicates that the subject, who is a member of the Black Panther Party, was arrested on 10/10/68 and is currently being held in the Los Angeles County Jail. The subject is a member of the Black Panther Party and is currently being held in the Los Angeles County Jail.

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These results suggest that the model is able to capture the essential features of the data, and that the proposed method is effective for handling missing data.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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and G. 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675

• <http://www.pearsoned.com>

to estimate the number of people who are at risk of being infected.

1.  $\lim_{t \rightarrow \infty} \|\mathbf{y}(t) - \mathbf{y}_d(t)\| = 0$  and  $\lim_{t \rightarrow \infty} \|\dot{\mathbf{y}}(t) - \dot{\mathbf{y}}_d(t)\| = 0$ .

...continued over the next several years to the extent of the ...

*(Signature)*

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Figure 1. Schematic diagram of the experimental setup.

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premises, and that it was in fact owned by someone else. This count stated no cause of action against defendants. Gleason did not contract that he was the owner of the property at the time of the agreement, but contracted to convey a good title to plaintiff. Furthermore, there was no proof to sustain the count. Gleason testified that he owned the property in question at the time he signed the contract.

The third count charges that plaintiff was procured to enter into the contract; that the earnest money was deposited with defendants, who did not deliver or offer to deliver said real estate to plaintiff, but attempted to force plaintiff to accept the same notwithstanding the defects in the title. This stated no cause of action against defendants. They were not parties to the contract and did not undertake thereby to convey the property to plaintiff. This was the obligation of the owner, Gleason.

July 17, 1920, H. C. Stone & Co., acting for Gleason, wrote a letter to Mr. Kelley, attorney for plaintiff, enclosing a copy of the Chicago Title & Trust Co.'s opinion on the title to the property. Certain objections were mentioned, but the letter stated that these had been taken care of and that the title was clear, and suggested that the attorney get in touch with his client to "arrange for an early closing of the purchase." Neither the plaintiff nor his attorney replied to this letter and never advised either Gleason or defendants that the title, as shown by the Chicago Title & Trust Co.'s opinion, was not acceptable. July 28, 1920, the attorney for plaintiff wrote a letter to Gleason, one to defendants and one to H. C. Stone & Co. These letters are identical and are in substance notice that McGee had elected to rescind the contract of July 1, 1920, for the purchase of the premises "for the reason that he was induced to enter into said contract by mis-

[illegible]

THE FIRST PART OF THE REPORT WAS CONCERNED WITH THE FACTS OF THE CASE; THE SECOND PART WAS CONCERNED WITH THE CONCLUSIONS DRAWN FROM THE FACTS; AND THE THIRD PART WAS CONCERNED WITH THE RECOMMENDATIONS MADE BY THE COMMISSION.

[illegible]



representations as to returns he would receive on his investment and for other reasons which no doubt are known to you." The return of the earnest money was demanded. Certain correspondence passed between the parties, and August 19th the owner, Gleason, addressed a letter to plaintiff and to his attorney, saying that the title had been perfected and asking that plaintiff arrange at once for the consummation of the contract. This letter was never answered. November 4, 1920, Gleason served on McGetrick a formal notice that because of McGetrick's refusal to consummate the purchase Gleason declared the contract terminated and all payments made thereon forfeited, and declared his intention to retain the earnest money pursuant to the contract. February following this suit against the real estate brokers was commenced.

It seems to be argued by plaintiff that because defendants did not tender a guaranty policy showing a clear title, plaintiff could rescind the contract and recover the earnest money. Defendants had not obligated themselves to deliver the property in question or to furnish an abstract or guaranty policy. These were the obligations of Gleason, the owner. Plaintiff ignored the notice that the title was perfected and the Title & Trust Co. were ready to issue a guaranty policy guaranteeing McGetrick and wife in the title. Plaintiff failed to prove any default or failure on the part of defendants or Gleason with relation to this contract; rather, the evidence shows that plaintiff defaulted, having changed his mind as to the wisdom of purchasing the property.

At no time did plaintiff base his refusal to proceed with the matter because of anything relating to the title or the method by which the contract was to be consummated. The sole and only ground given for his refusal to proceed was the alleged misrepresentations of the defendants. It has been held that in so





doing he waived all other contentions which he now makes as a reason why he should not perform the contract.

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to amend his hold. He is estopped from doing it by a settled principle of law." Gibson v. Brown, 214 Ill. 350.

Plaintiff also filed with his declaration the common counts, but he cannot recover on these for the reason that the contract was executory and had not been rescinded by mutual agreement. Under such circumstances, where the executory contract is still subsisting and no act is done or omitted by the seller which will authorize the purchaser to consider it rescinded, the remedy must be on the special contract and he cannot recover under the common counts. Phelps v. Hubbard, 59 Ill. 79; Clause v. Bullock Printing Press Co., 118 Ill. 612; Paraly v. Farrar, 169 Ill. 608; Thompson v. Hoppert, 120 Ill. App. 591.

The record shows that plaintiff was in default in his obligations under this contract. The other party to the contract was therefore clearly entitled under its terms to retain the earnest money. Applicable to this suit is what is said in DeFrege v. Bedborough, 4 Cliff. 479, quoted in Buckley v. Haglerlik, 155 Ill. 423:

"Then how the person who was in default can, upon that default and in consequence of that default, acquire any right to the money, which was parted with as a security that there should be no default, it is difficult to conceive."

This was applied in Summers v. Heidenberg, 198 Ill. App. 460. To the same effect is Whelier v. Mathay, 56 Ill. 241.

At the conclusion of the trial the defendants moved the court to give a peremptory instruction to the jury to find the defendants not guilty, but such motion was denied and the instruction tendered marked "refused." This motion should have been

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allowed and the instruction given.

For the reasons above given the judgment is reversed  
and the cause is remanded.

REVERSED AND REMANDED.

Dever and Matchett, JJ., concur.

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315 - 27791

PAUL FINEMAN,  
Appellee,

vs.

HARRY GOLDBERG et al.,  
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

Complainant, Fineman, filed his bill in chancery asserting a partnership pursuant to a verbal agreement between himself and the defendants, Harry Goldberg, Samuel Goldberg and Norman Goldberg, whereby they agreed to engage as co-partners in running a drug store, ice cream parlor and soda fountain at 600 North Clark street in Chicago; that complainant should receive one-half of the net profits arising out of the business, and the defendants the other half; complainant to devote his entire time and skill towards conducting the business, and the defendants to supply the money to purchase the stock of drugs, fixtures, soda water fountain, etc.; that after carrying on the business for a while defendants forced the complainant out and declined and refused to render an accounting, declaring that complainant had no interest in the business. Complainant asked for an accounting and that defendants be decreed to pay whatever was due him; that the partnership be dissolved and its assets be distributed. Defendants filed an answer denying the allegations of partnership and alleging that complainant was employed as a clerk. The cause was referred to a master in chancery, who heard evidence and reported sustaining complainant's allegations of a partnership agreement and finding that he was

THE PEOPLE, )  
vs. )  
HARRY GOLDBERG, )  
Defendant.

STATE OF NEW YORK,  
County of New York.

JOHN J. CONNELLEY,  
Clerk of the Court,  
DOCK COUNTY.

IN SENATE CHAMBERS  
Held this 10th day of May, 1934.

Complainant, William, filed his bill in chancery asserting a partnership agreement to a verbal agreement between himself and the defendant, Harry Goldberg, Samuel Goldberg and Norman Goldberg, whereby they agreed to engage as co-partners in running a drug store, ice cream parlor and soda fountain at 200 North Clark street in Chicago; that complainant should receive one-half of the net profits arising out of the business, and the defendant the other half; complainant to devote his entire time and skill towards conducting the business and the defendant to supply the money to purchase the stock of drugs, fixtures, soda water fountain, etc.; that after carrying on the business for a while defendant turned the complainant out and declined and refused to render an accounting, declaring that complainant had no interest in the business. Complainant asked for an accounting and that defendant be decreed to pay whatever was due him; that the partnership be dissolved and its assets be distributed. Defendant filed an answer denying the allegations of partnership and alleging that complainant was employed as a clerk. The cause was referred to a master in chancery, who heard evidence and reported sustaining complainant's allegations of a partnership agreement and finding that he was



entitled to an accounting of the profits and if, upon such an accounting, net profits were shown, he was entitled to a decree of one-half of the same. Objections were filed to the master's report, which were overruled. They were ordered to stand as exceptions, and upon hearing by the chancellor these were overruled and a decree was entered confirming and approving the master's report. From this decree defendants have appealed.

The master found substantially that in April, 1920, complainant was employed in the drug business; that defendants were brothers, and that Harry Goldberg had a lease on premises at 600 North Clark street; that during that month Norman Goldberg on behalf of himself and his brothers proposed to complainant that they establish a drug store at 600 North Clark street and complainant should take over the management of the business and receive fifty per cent of the profits; that this proposition was accepted by Fineman and ratified by the defendants, Harry and Samuel Goldberg; that a permit under the National Prohibition Act to carry on this business at this place was issued to Norman Goldberg and Paul Fineman, the complainant, who had signed the application therefor. Also a drug store license from the City of Chicago was issued to Goldberg and Fineman to keep a drug store on the premises and a bank account was opened in the name of Goldberg and Fineman. The drug store was opened for business with complainant and Norman Goldberg in charge and the business was conducted under the name of Clark and Ohio Drug Store; that such business was continued in this manner until August 20, 1920, when the Goldbergs refused to allow complainant Fineman to have anything further to do with the business and denied his right as a partner therein.

The master found that complainant entered into a part-

entitled to an accounting of the profits and if, upon such an accounting, net profits were shown, he was entitled to a share of one-half of the same. Objections were filed to the master's report, which were overruled. They were ordered to stand as exceptions, and upon hearing by the chancellor these were overruled and a decree was entered continuing and approving the master's report. From this decree defendants have appealed.

The master found substantially that in April, 1900,

complaint was employed in the drug business; that defendants were partners, and since Harry Lefkowitz had a license on premises at 800 North Clark street; that during that month Herman Goldberg on behalf of himself and his brothers proposed to complainant that they establish a drug store at 800 North Clark street and complainant should take over the management of the business and receive fifty per cent of the profits; that this proposition was accepted by Wineman and ratified by the defendants, Harry and Samuel Goldberg; that a permit under the National Prohibition Act to carry on this business at this place was issued to Herman Goldberg and Paul Wineman, two complainants, who had signed the application thereto. Also a drug store license from the City of Chicago was issued to Goldberg and Wineman to keep a drug store on the premises and a bank account was opened in the name of Goldberg and Wineman. The drug store was opened for business with complainant and Herman Lefkowitz in charge and the business was conducted under the name of Jack and Otto Lefkowitz; that such business was continued in this manner until August 30, 1900, when the Goldberg's refused to allow complainant Wineman to have anything to do with the business and denied him right in a partner therein.

The master found that complainant entered into a part-

nership agreement with the defendants to carry on this business, whereby complainant agreed to give all his time, skill and labor to the drug business at this location, the said Goldbergs agreeing to supply all the necessary funds therefor and to give complainant fifty per cent of the net profits from the business; that no time was fixed for the duration of the partnership nor any statement made that complainant should bear any proportion of the losses, if any such occurred.

The decree confirmed and approved the master's report and included findings substantially the same as those made by the master. The decree further finds that defendants, on August 20th, wrongfully excluded complainant from the partnership business, although complainant demanded that he be permitted to continue to carry on the same as manager; that he demanded an accounting, which defendants refused. It was decreed that there should be an accounting and the cause was referred to the master in chancery to make such an accounting and report the same to the court.

We have carefully considered the record and are of the opinion that the evidence justified the master's report and the decree.

It is said that the exact date of the agreement of co-partnership is in doubt. The exact date of the first conversation is not important. Complainant's bill alleged that the co-partnership was arranged "on, to-wit, the first day of June" 1920. The master found that it was entered into during the month of April; the allegation of the date was under a videlicet; hence it was not necessary to prove the date strictly as alleged. Collins v. Sanitary District, 270 Ill. 111.

Defendants argue that the share of complainant in the profits was not definitely proven. The complainant testified positively that he was to receive one-half of the net profits



partnership agreement with the defendants to carry on this business, whereby complainant agreed to give all his time, skill and labor to the said business at this location, the said Goldberger agreeing to supply all the necessary funds therefor and to give complainant fifty per cent of the net profits from the business; that no time was fixed for the duration of the partnership nor any statement made that complainant should bear any proportion of the losses, it was understood.

The decree confirmed and approved the master's report and included findings substantially the same as those made by the master. The decree further finds that defendants, on August 20th, 1930, caused complainant to leave the partnership business, although complainant demanded that he be permitted to continue to carry on the same as manager; that he demanded an accounting, which defendants refused. It was decreed that there should be an accounting and the cause was referred to the master in chambers to make such an accounting and report the same to the court. We have carefully considered the record and are of the opinion that the evidence justified the master's report and the decree.

It is said that the exact date of the agreement of co-partnership is in doubt. The exact date of the first contribution is not important. Complainant's bill alleged that the co-partnership was arranged "on, to-wit, the first day of June" 1930. The master found that it was entered into during the month of April; the allegation of the date was under a misapprehension; hence it was not necessary to prove the date exactly as alleged. Collier v. Langley, 200 Ill. 411.

Defendants argue that the share of complainant in the profits was not definitely proven. The complaint testified positively that he was to receive one-half of the net profits



and the alleged variations in his statements on this point do not substantially change this testimony.

The partnership agreement is attacked on the ground that it does not appear that all the partners were to share losses. This is not an inevitable element of a partnership. Sharing in profits is the real test. Faugner v. First National Bank of Chicago, 141 Ill. 124; Leeds v. Townsend, 228 Ill. 456. Complainant said it was understood that in case of losses his full time and skill which he devoted would be his loss.

It is said that the partnership was terminated when complainant's connection therewith was ended. This is not strictly accurate. The partnership may have been dissolved at that time, but not necessarily terminated. In law it continues until the winding up of partnership affairs is completed. Illinois Statute Cahill, chap. 106a, Partnerships, secs.29, 30 and 31.

It is argued at length that the findings in the decree and master's report are not supported by the evidence. We are of the opinion that they are. While there was some controversy between the witnesses, yet as the master heard and saw them we are disposed to trust his better opportunity to pass upon the question of credibility. It cannot be said that his conclusions are clearly against the weight of the evidence. Smith v. Thomas Elevator Co., 278 Ill. 332; Buddy v. McDonald, 244 Ill. 497.

We are of the opinion that the decree is in accordance with the weight of the testimony and it is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

and the alleged variations in the statements on this point do not

constitute a material variance.

The partnership agreement is attached to the record.

That it was not agreed that all the partners were to share

losses. This is not an inevitable element of a partnership.

Nothing is said in the trial court. Johnson v. Johnson, 111 Ill. 202.

Bank of Chicago, 111 Ill. 122; Lewis v. Johnson, 111 Ill. 202.

Comments are made in the record that in case of losses the

partnership would be dissolved.

It is said that the partnership was terminated when

complaints were made about the partnership. This is not clearly

settled. The partnership may have been dissolved at that time,

but not necessarily terminated. The law is continuous until the

winding up of partnership affairs is completed. Illinois Statute

Section 10-1-1, 10-1-2, 10-1-3, 10-1-4, 10-1-5, 10-1-6, 10-1-7, 10-1-8, 10-1-9, 10-1-10.

It is argued at length that the findings in the record

and general report are not supported by the evidence. The law of

the opinion of the court is that the partnership was dissolved.

between the witnesses, yet in the matter of the partnership and how they are

disposed to treat the partnership is upon the question

of partnership. It cannot be said that the partnership was dissolved

against the weight of the evidence. Johnson v. Johnson, 111 Ill. 202.

Bank of Chicago, 111 Ill. 122; Lewis v. Johnson, 111 Ill. 202.

It is the opinion of the court that the partnership was dissolved

with the weight of the evidence and it is affirmed.

THE COURT.

Very truly yours,  
J. H. HARRIS, Clerk.

27850  
31 - 27850

T. LORITE et al.,  
Appellees,

vs.

W. V. JABISZAK et al.,  
Appellants.

2767A  
APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

229 I.A. 630

MR. PRESIDING JUSTICE MESURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit to recover commission as real estate brokers and upon trial by the court had judgment for \$265, from which defendants appeal.

The most prominent points presented relate to an ordinance of the City of Chicago, said to require real estate brokers to take out a license, and to the character of the license issued to plaintiffs. No ordinance in this respect was introduced in evidence on the trial and none appears in the record before us. It has been decided many times that this court does not take judicial notice of city ordinances. In its absence, the reviewing court cannot consider points made with reference thereto and must presume that the action of the trial court was proper so far as it relates to any question involving such an ordinance.

The evidence is sufficient to support the claim that the plaintiffs were doing business as the Chicago Realty Exchange Company and procured a purchaser for defendants' property, and the sale was closed through plaintiffs' efforts as brokers. Under such circumstances the brokers were entitled to a commission.

A variance is suggested because of some uncertainty as to the spelling of the purchaser's name. It appears one place to be spelled "Wrasinski" and at another time he was referred to as "Vryisalik." This uncertainty was called to the attention

THE UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

UNITED STATES OF AMERICA

VS.

JOHN EDGAR HOOVER

100-100

UNITED STATES OF AMERICA  
DEPARTMENT OF JUSTICE  
DIVISION OF INVESTIGATION

INVESTIGATION OF THE ACTS OF THE UNITED STATES OF AMERICA  
AND THE DEPARTMENT OF JUSTICE  
IN THE MATTER OF THE UNITED STATES OF AMERICA

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of the trial court who found that there was only one purchaser and that he appeared in court and testified. The identity of the purchaser was established, although the uncertainty as to the spelling and pronunciation of his name remains; but this would not affect the judgment.

There is no reason to reverse, and the judgment is affirmed.

AFFIRMED.

Dover and Hatchett, JJ., concur.

[illegible]

FANNIE BRILL,  
Appellee,

vs.

JACOB KLEIN,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

MR. PRESIDING JUSTICE MESURELY  
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant for \$153.65, in a case of the fourth class in the Municipal court. The appeal was allowed on condition of filing a bond within thirty days from the date of judgment and a bill of exceptions within sixty days.

The record does not show that any bill of exceptions was filed. On the date the judgment was entered a certain paper called a "Statement of the Case" was filed in the office of the clerk and this document appears in the record. It does not purport to show that any witnesses testified or that any evidence was presented. There is nothing therein relating it to a trial. At the bottom of the document is the typewritten name purporting to be that of the trial judge. There is nothing to show that the Judge who heard the case signed this paper, and there is no certificate by him that it is a correct statement of the facts or stenographic report of the proceedings at the trial, certificate of evidence or correct statement of any proceedings in the case. We know of no statute which recognizes such a document on appeal to this court.

There is therefore properly before us only the statutory record, and as no error appears therein the judgment is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

THE UNIVERSITY OF CHICAGO

[illegible][illegible]

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research.



L. E. WATERMAN COMPANY,  
Appellant,

vs.

A. A. WATERMAN & COMPANY,  
Incorporated,  
Appellee.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

229 I.A. 630<sup>2</sup>

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

L. E. Waterman, a corporation, filed a bill in equity in the Superior court of Cook County against A. A. Waterman & Company, a corporation, to restrain the latter from infringing two registered trade marks, being the name "Waterman" and "Waterman's Ideal Fountain Pen N. Y.," registered by complainant in the United States Patent office, and to enjoin defendant from alleged acts of unfair competition in the manufacture and sale of fountain pens.

Complainant's right to the relief prayed is set forth in an original bill and supplemental bill, which charge in substance that the defendant had infringed upon complainant's right to the trade marks in question, and that it had by an improper use of the name "Waterman" in its corporate title and in connection with its manufacture and sale of fountain pens indulged in unfair competition with complainant. Defendant's answer denies these allegations of the bill which charge the defendant with infringing upon complainant's alleged trade mark rights and that it had been guilty of unfair competition as charged in the bill.

As no question arises here upon the pleadings, more particular mention need not be made of the allegations of the supplemental bill nor of the answer. The pleadings were referred to a master in chancery to take evidence and report his conclusions of law and fact to the court.



In his report the master found that the issues were with the complainant and he recommended the entry of a decree in accordance with the prayer of the bill. Objections filed to the report, which were overruled, were permitted to stand as exceptions thereto. The master's report was confirmed except as to two certain exceptions described as exceptions 9 and 13 $\frac{1}{2}$ , and also the decree denied the prayer of the bill for an accounting against defendant, which had been recommended by the master.

Complainant seeks by its appeal to this court the entry of a decree in accordance with the recommendations of the master. Defendant assigns cross-errors and it asks that the decree be reversed with directions to dismiss the bill at appellant's costs for the reasons that "the facts, and the law governing those facts, show appellee had a right to use the name "A. A. Waterman" and that its use of this name had not been unfair.

The evidence in the case is voluminous and it will be possible here to refer only to the principal facts as shown by the evidence and found by the master, which findings were confirmed by the chancellor.

Lewis E. Waterman began the manufacture and sale of fountain pens in the city of New York in the year 1833, and adopted as trade name the word "Waterman's" and also the words "Waterman's Ideal Fountain Pen, N. Y." In 1887 complainant was organized in the State of New York and Lewis E. Waterman conveyed to it all of his rights and interest in the business previously conducted by him. From this time until the filing of the bill herein complainant continued to use upon its fountain pens, boxes, stationary and packages the words "Waterman's" and "Waterman's Ideal Fountain Pen, N. Y." In the years 1901, 1906 and 1907 these trade names were

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registered by complainant as trade marks in the United States Patent office. Complainant has since its organization spent large sums of money yearly in advertising its fountain pens under the names "Waterman," "Waterman's," "Waterman's Fountain Pens," "Waterman's Ideal Fountain Pens," and "Ideal Pen." For many years prior to the organization of defendant complainant was well known throughout the trade and by the public as the "Waterman Company."

Defendant company was organized in the State of Arizona in 1906, and shortly thereafter it began the manufacture and sale of fountain pens. Both complainant and defendant were authorized to transact business in the State of Illinois, and defendant maintained its principal office in the City of Chicago. A. A. Waterman was employed by Lewis M. Waterman, Jr., the founder and organizer of complainant, in the year 1933, and he continued in the service of complainant and its founder, irregularly, until the year 1937, when he, with one Gibson, engaged on their own account in the manufacture of fountain pens under the name of "A. A. Waterman Pen Company," a copartnership. The copartnership was dissolved in 1939; prior thereto complainant brought an action in the Supreme court in the State of New York against A. A. Waterman and Gibson to restrain them from doing business under the name of "A. A. Waterman Pen Company," and a decree was entered in that suit in favor of complainant on September 3, 1938, which found the defendants guilty of unfair competition in the use of the name "Waterman," and which restrained them from using the corporate name "A. A. Waterman Pen Company" or any corporate name containing the word "Waterman," and from using in connection with the business of making or selling fountain pens, whether "on the holder or the gold pen, or on the labels, boxes, signs, letterheads, billheads,



circulars or advertisements, or in any manner whatever the word 'Waterman,' 'Waterman's,' or 'Watermans' alone, or the word 'Waterman,' 'Waterman's,' or 'Watermans' (whether the same be or be not coupled with other names or initials) in such a collocation with the word pen or fountain pen (whether the same be or be not coupled with some further descriptive word or words), as to indicate that the fountain pens so made or sold are a variety of Waterman's fountain pens. But defendants are not prohibited from indicating that fountain pens made by them are made or prepared or sold for or by Arthur A. Waterman & Company or A. A. Waterman & Company.\*\*\* From advertising any of defendants' fountain pens under the style 'A' or 'A. A.' or from marking said styles 'A' or 'A. A.' in connection with the word 'Waterman' upon defendants' fountain pens, either upon the gold pen or the holder thereof."

After the dissolution of the copartnership consisting of A. A. Waterman and Gibson, Waterman was engaged for some time in various ways in connection with the manufacture of fountain pens. In 1901 he entered into a partnership with one Fraser and one Geyser to manufacture fountain pens. He continued in this business until 1906, when this copartnership also was dissolved; thereafter a new partnership was organized consisting of A. A. Waterman and Jesse E. Chapman and William L. Chapman. Waterman's testimony is to the effect that this company never engaged in any business; it was known as "A. A. Waterman & Company." Thereafter Waterman was connected with what he calls the "Modern Pen Company," which he describes as a "holding" company. He severed his connection with this company in 1906; a short time later defendant company was organized. Waterman first met one Fred A. Field about the year 1885, to whom he later sold pens manufactured by complainant. Field was connected in some way in 1903 and 1904 with Modern Pen Company. At the time defendant







was organized, Waterman, who does not appear to have put any money into the enterprise, received \$50,000 face value of defendant's common stock and 500 shares thereof were left in custody of defendant's secretary, part of which were sold by Waterman, who testified that this stock was nominally his and was given to him "for a contract that I had with the Eastern people of New York from the old partnership, A. A. Waterman & Company, that I turned over to them." Waterman's testimony as to his interest in the defendant corporation at and after the time of its organization is somewhat uncertain. He said, "I don't think any portion of the stock was put into my possession except enough to make me a director." The evidence does tend to show, however, that Field got possession of defendant's common stock as security for the payment of about \$2,000 advanced to Waterman, which he testifies was used in organizing and promoting defendant's business. There is some confusion in the evidence concerning the early history of defendant and the relations of Field, Waterman and one Herbert A. Henry to it, but the evidence is abundant that Field and Henry were the actual owners of defendant company and that Waterman's interest therein was merely nominal. He had had a somewhat extended experience in marketing fountain pens, but there is good ground for holding that the organizers of defendant were mainly interested in obtaining a colorable right to use the name "Waterman." A. A. Waterman at all events attempted to confer upon defendant an exclusive right to use the name. During some months prior to the organization of defendant, Waterman had been in conference with Field with the object of organizing a company to manufacture and sell fountain pens. In the course of these conversations they discussed whether a proposed organization and business might be interfered with by injunction proceedings. As a result of these



conversations Field loaned Waterman money to pay incorporation fees required in the organization of defendant. Following the organization of defendant, Waterman maintained a real estate office in Chicago, and with small amounts of money advanced by Field he made some preparations to organize and promote the business of the corporation. Henry became interested in defendant corporation as a stockholder in 1906 and in 1907 became its treasurer. A. A. Waterman ceased to have any connection with the defendant in 1909. Field became defendant's general manager about the year 1907, and later became its president. Prior to 1909, A. A. Waterman had been engaged as a salesman for defendant.

Waterman testified that he cautioned Field that trouble might be encountered if their company used the name "Waterman" in such manner as to violate the New York decree.

We are unable, within proper limits, to indicate all the evidence tending Waterman's connection with complainant and defendant, or with other persons upon whom he endeavored to confer a right to use the name "Waterman" in connection with the manufacture and sale of fountain pens.

In its answer defendant denied that it had ever used the word "Waterman" or "Waterman's" alone in connection with its products, and also denied it had used the word "Waterman" in conjunction with other words, "A. A. Waterman & Co." or "A. A. Waterman & Company."

Complainant had used the word "Waterman" and "Waterman's" in connection with its product for about twenty years prior to the adoption of the word by defendant.

The court overruled an exception to findings of the master "that fountain pens marketed by defendant, bearing the name 'Arthur A. Waterman & Company, Incorporated,' or 'A. A. Waterman & Co.,' or 'A. A. Waterman & Co., Inc.,' either upon said fountain pens, or on the barrels thereof, or receptacles containing



1. The first part of the report deals with the general situation of the country and the progress of the work of the Commission. It is divided into two main sections: the first section deals with the general situation and the second section deals with the progress of the work of the Commission.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the "Black Panther Party" in the United States.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Security Establishment in the United States.

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the name, are easily and readily both sold to and purchased by the trade, and sold to and purchased by buyers at retail, and the public generally as and for 'Waterman' fountain pens, and that defendant and its officers and agents must have known this to be so; and that the defendant cannot use the name 'Waterman' or 'Waterman's' either in its corporate style or on its merchandise, receptacles or stationery, either alone or in any combination, or with or without prefixes or suffixes, or both, without causing confusion in the trade and in the public mind, and substituting and enabling the substitution of fountain pens marketed by defendant with and for the fountain pens of complainant, and without producing confusion of the corporate identity and business of the defendant with those of the complainant." The master further found that even if the defendant had no actual design to defraud, the close resemblance and simulation of names were such as rendered it possible for unscrupulous dealers to palm off and sell defendant's product for that of the complainant, and that these facts constituted unfair competition. The findings in the decree are substantially the same as those of the master, who recommended that relief be granted complainant in accordance with the prayer of the bill, and that defendant be restrained from using the name "Waterman in any and all forms and connections," and also from infringing complainant's trade-marks, "Waterman" or "Waterman's Ideal Fountain Pen, N. Y."

Notwithstanding that the court found the facts in accordance with the report of the master, it contained exceptions to the relief recommended by him. Both the master and the court were of the opinion that the defendant had used the name "Waterman" in unfair competition with complainant. The master's findings of fact are well supported by the evidence. The main question is whether the decree awarded complainant an adequate remedy. The decree restrains the use by defendant of the word "Waterman's" in the manu-

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facture, advertising or sale of fountain pens or parts thereof "either alone, or in any combination, or with any prefixes or suffixes." However, the decree directed that defendant might use the name A. A. Waterman & Co., Inc., in connection with the manufacture and sale of its fountain pens or in receptacles therefor, or in advertisements, circulars, etc., but that whenever defendant so used this name "it shall conspicuously print, place, add, and juxtapose in immediate connection with said name, and without anything intervening in equally clear, large, prominent and noticeable type or letter press of the same color, the phrase, 'Not connected with L. E. Waterman Company.'" The decree as entered fails, we believe, to award to complainant any relief of value to it. The findings of the master, concurred in by the chancellor, are that the use by defendant of the word "Waterman" caused confusion in the public mind as to the actual producer of the products indiscriminately offered for sale and in the trade and generally known as "Waterman pens." Complainant's position is, and it is supported by the evidence, that it has been greatly damaged by the unfair use by defendant of the word "Waterman" or "Waterman's" in various ways in the marketing of fountain pens, and that the decree as entered awards no relief of value to it.

The thing that stands out prominently in the whole record is that the word "Waterman" in the corporate titles and on the articles produced by the parties is the one word that is of real value to each party and this value was created by reason of the fact that complainant for many years before defendant became complainant's competitor adopted and used the name in its business.

The decree finds that the names "Waterman" and







"Waterman's" had for many years "indicated and designated and now indicates and designates pens and fountain pens, and parts thereof, made, marketed and supplied by complainant and its predecessor, and that for many years said names have been and now are so understood; that such designative and secondary meaning of said names had long prior attached to the manufacture, marketing or supplying of pens or fountain pens, or parts thereof, by Arthur A. Waterman, or any person, firm or corporation claiming by, through, or under him, and long prior to the employment by anyone, other than complainant, or its predecessor, in the manufacture, marketing, or sale of fountain pens, of any name in which the word 'Waterman' or 'Waterman's' was used, and that said name 'Waterman' and 'Waterman's' had at the time aforesaid each acquired and possessed, and at all times since and now have and do possess said secondary meaning and significance designative of complainant's (and predecessor's) products and business as aforesaid." The decree found that defendant had full knowledge of the secondary meaning of the words "Waterman" and "Waterman's" as used by complainant and that defendant "has been and now is guilty of unfair competition with complainant by the use of the name A. A. Waterman & Co., as its corporate style, and in its business, and on its pens, fountain pens, barrels and clips thereof, and in circulars, price-lists, placards, show cards, signs, directories, catalogues and advertisements, and on cases and stationery, and that the use of the 'A. A. Waterman & Co.' in any and all forms and connections upon its products and in its business by defendant has confused and misled and was and is calculated and intended to confuse, and mislead the trade, buyers for use, and the public generally, into the belief that the defendant's business and products are the business and products of complainant, and has enabled and resulted in such confusion and misleading and the sale of defendant's pens and fountain pens and products as and for the pens and fountain pens



and products of the complainant and the confusion of defendant's business with complainant's business, and that the use of such name will, if continued, as heretofore, confuse the defendant's business and products with the business and products of complainant, and that defendant at all times had full knowledge of such results of its use of the name A. A. Waterman & Co."

It is argued that the surname of Waterman could not constitute a legal trademark. There are cases which hold that a surname or geographical name cannot be used as a trade mark; these cases in the main involve no question of actual fraud and most of them were decided prior to the passage of an amendment of the Federal Act of 1905. Section 5 of the Trade Mark Act of February 20, 1905, was amended in 1911 by adding the following:

"that nothing herein shall prevent the registration of a trade-mark otherwise registrable because of its being the name of the applicant or a portion thereof."

It has been held that a court of equity will not permit one, aside from any question of trade mark, to palm off his goods as the goods of another, and so deceive the public and injure that other. McLean v. Fleming, 98 U. S. 250.

In Hove Scale Company v. Vyckoff, Seagons & Menadict, 198 U. S. 118, relied upon by defendant, the court held that "in the absence of contract, fraud,<sup>or</sup> estoppel, any man may use his own name, in all legitimate ways, and as the whole or part of a corporate name."

In Morton et al. v. Morton, 148 Cal. 142, it was held that the courts will not enjoin a person from any use whatsoever of his own name because it is already used as a trade name by another, but would forbid its use in such way as would be likely to deceive the public.

In Allegretti et al. v. Allegretti Chocolate Cream Co., 177 Ill. 133, it was held that the right of a person to the free use of his own name in his business could be exercised only in the







absence of fraudulent or wrongful intentions.

In Hazeltan Boiler Company v. The Hazeltan Trized Boiler Co., 142 Ill. 494, where an injunction was prayed to enjoin the use of the word "Hazeltan," the court held that one Hazeltan had a right to use his own name in the business conducted by a corporation in which he held a substantial interest, and that if thereby any injury resulted to complainant in the case it was damnum absque injuria. It appears from the opinion in that case that the defendant had used more than ordinary efforts to apprise the public that it and complainant were separate concerns; that neither corporation dealt with the trade; that they sold their products directly to the ultimate user; and that the defendant's conduct had not been such that the public would be likely to be misled by the use of the name. The facts are quite different in the present case. We have been favored with numerous citations of authorities on this question. While there is some confusion in the decided cases, the great weight of authority is to the effect that a person will not be permitted by unfair means to profit by the trade reputation of a competitor, and this question is one of fact which often turns on the good faith of a defendant who sets up the right to use a particular name. International Silver Co. v. Am. Rogers Silver Co., 67 N. J. Eq. 646.

The New York decree runs against A. A. Waterman and those holding under him. The evidence shows that Waterman and those co-operating with him, with full knowledge of the decree, entered into an arrangement for the organization of defendant corporation. They were privies, and their main objective was to procure a colorable right to use a name which by complainant's exertions had become valuable when applied in the marketing of fountain pens.

In the case of Southern Pacific R. R. Co. v. United States, 168 U. S. 1, the court said:

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"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

In Towle v. Quanta, 246 Ill. 573, the Supreme Court held that the word "privity" denotes mutual or successive relationship to the same rights of property. The court said:

"This relationship may be by operation of law, by descent, or by voluntary or involuntary transfer from one person to another. All privies are in effect, if not in name, privies in estate. They are bound because they have succeeded to some estate or interest which was bound in the hands of its former owner. (Wresman on Judgments, 3rd ed., sec. 162; Orthwein v. Thomas, 127 Ill. 354.)"

The property right in the present suit is the contested right to the use of the name "Waterman." The defendant insists that it has the right to use this word in its corporate title and business, because, as it says, it was honestly acquired from A. A. Waterman, who was directly bound by the New York decree. Being, as we think, in privity with Waterman, the defendant could take from him only such rights as were not denied to him in the New York decree.

The master found that complainant had the exclusive right to use the name "Waterman" by virtue of the registration of the name in the United States Patent office. An exception to this part of the report was sustained. The record does not warrant a conclusion that complainant sought to establish a monopoly in the manufacture of fountain pens. One principal purpose, as we read the bill, was to secure the exclusive right under trade-mark laws to use the name "Waterman."

It is asserted that an affidavit to procure the registration of the names is in conflict with certain allegations of the bills, and that the chancellor was correct in holding that complainant acquired no rights under its registration of the names. It is said that this holding was based upon a conclusion that registration



1968-01-01  
The above information was obtained from the records of the Federal Bureau of Investigation, Washington, D.C., dated January 1, 1968.

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research.

1. The Commission has received information that the following persons have been identified as being involved in the activities of the Communist Party, U.S.A. (CPUSA) in the State of New York:

The Government has no right to interfere with the conduct of private business. The Government has no right to interfere with the conduct of private business.

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had been procured by fraud. The affidavit in substance recited that complainant had actually and exclusively used the names in such manner and for such length of time that under the law it became entitled to their registration. The bill does allege and the evidence shows that a fraudulent and unauthorized use of the word in unfair competition with complainant was indulged in by A. A. Waterman and others prior to the application for registration. That this use of the name was unfair was decided by the New York decree. The evidence does not warrant a finding that the registration of the trade-marks was brought about by fraud. Complainant used, and had the sole right to use, the name "Waterman" in connection with the marketing of fountain pens for at least twenty years prior to the application for registration, and whatever sporadic use was made of the name by A. A. Waterman and those connected with him was in fraud of its rights. Thaddeus Davids Company v. Courtlandt J. Davids et al., 190 Fed. 285.

It cannot be said on the evidence that this affidavit was in fact untrue. The master held that the registration of the trade marks was at the time of the hearing in full force and effect, and this holding was correct.

In Saxlehner v. Hisher & Mandelson Co., 179 U. S. 19, it was held that it is "not necessary to constitute an infringement that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article." Facts which constitute an infringement of trade-mark would, in the ordinary case, amount to unfair competition. Manitowoc Pen Packing Co. v. Munson & Sons, 35 U. S. A. 267.

It is our opinion that defendant was bound by the New York decree and also that complainant's registration of the trade names was in full force and effect; but even if mistaken upon these questions, defendant should have been enjoined absolutely from con-



tinued use of the name Waterman in its corporate title and business.

The juxtaposed phrase, "not connected with L. E. Waterman & Co." gives complainant but little or no relief from the wrongful conduct of the defendant. We repeat, the evidence shows that A. A. Waterman has not and never has had any substantial pecuniary interest in defendant or its business, and on the whole evidence, aside from other questions, the defendant should be enjoined from using the registered names on the ground that such use constitutes unfair competition.

Complainant has submitted its claimed exclusive right to the use of the name "Waterman" in various cases and at different times to the courts. All of these cases arose out of attempts on the part of A. A. Waterman to confer upon different persons in one way or another the right to use his surname in the manufacture and sale of fountain pens.

In all of the cases except one, Chapman v. L. E. Waterman, 163 N. Y. S. 1039, Waterman seems to have sustained an actual interest in the business carried on by the parties defendant; hence these cases involve the right of a person to use his own name in a business conducted by him.

From an examination of these cases and of the record before us it becomes perfectly clear that complainant has been seriously harrassed and damaged by the unfair conduct of A. A. Waterman and those at different times in privity with him, and it is our opinion that it has not, to this time, been awarded a remedy sufficiently adequate to protect it from a long history of business persecution. We deem it essential, therefore, that we briefly review these cases, in certain of which the use of the juxtaposed phrase, "Not connected with L. E. Waterman & Co." was directed.



1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

NOTE: DURING THE 1990S, THE JOURNAL PUBLISHED TWO VOLUMES PER YEAR.

*Journal of Management Education* 32(10) 1039-1050

...the ... ..

See also: [Cognitive Psychology](#), [Developmental Psychology](#), [Educational Psychology](#), [Environmental Psychology](#), [Health Psychology](#), [Industrial Psychology](#), [Organizational Psychology](#), [Personality Psychology](#), [Social Psychology](#), [Sports Psychology](#), [Theoretical Psychology](#)

These studies suggest that the use of a single, standard, and simple questionnaire is a feasible and effective method for assessing the prevalence of mental health problems in the community.

Abstr. engl. u. russ. Sprache des Autors und des Übersetzers

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and the following results are obtained:

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In the case of L. E. Waterman & Co. v. Modern Pen Co., 235 U. S. 22, the Supreme Court of the United States affirmed a decision of the lower court, which had directed the same juxtaposition of words as directed by the Decree before us. In that case the plaintiff insisted that a purported agreement between A. A. Waterman and others, by which Waterman became a member of a firm known as A. A. Waterman & Co., was a sham; that the firm did not make pens which were sold by the defendant, Modern Pen Company, a selling agency, and that Waterman's arrangements with the firm were merely colorable devices to enable the defendant in that case to get the name Waterman upon its pens. In passing on this contention the Supreme Court said:

"If we were to adopt this view of the facts the nature of the parties' rights and powers might need a more careful discussion than, so far as we are aware, it has received as yet;" that as to whether the relief granted would be adequate under different facts, "we express no opinion upon the point beyond saying that it would have to be considered before the plaintiff could obtain a broader decree."

The court further held that A. A. Waterman assented to partnership arrangements which authorized the use of his name in a business in which he had "pecuniary reason for wishing to see succeed." No such reason appears in the present case. The evidence shows that Waterman's dealings with Field, Henry, and others were for the purpose of bestowing upon defendant, in which he had no pecuniary interest of consequence, the right to use his name, and in this important particular it differs widely from the Modern Pen Company case. Mr. Justice Pitney, however, even on the record in that case, in a dissenting opinion said:

"The case presents no question respecting the right of an individual to the bona fide use of his name, but rather the question whether a partnership or corporation can, by purchase or otherwise, obtain the right to use the name of a third party for the very purpose of employing it in unfair competition in the established business of still another party."

Mr. Justice Pitney was of the opinion that the Modern

In the case of the *Chlorophyll* it is a different story. The *Chlorophyll* is a green pigment which is found in the leaves of plants and in the green parts of some algae. It is the substance which gives plants their green color. The *Chlorophyll* is a complex molecule, and its structure is still a matter of debate. It is believed that it consists of a central magnesium atom surrounded by four nitrogen atoms, which are in turn surrounded by a ring of carbon atoms. The whole molecule is embedded in a protein sheath. The *Chlorophyll* is essential for the process of photosynthesis, which is the way in which plants make their food. Without *Chlorophyll*, plants would be unable to convert light energy into chemical energy, and life as we know it would not be possible.

Pen Company should be unqualifiedly enjoined from using the name "Waterman" and we think the majority members of the United States Supreme Court would have concurred in this opinion were it not for the fact that the record in the case disclosed that A. A. Waterman had an actual interest in the business which bore in its title and upon its product the name "Waterman." Mr. Justice Brand, when the case was before the Federal District Court (193 Fed. 242) held that a decision upon a preliminary injunction prayed for in the case recited that a certain re-organization of the business with which A. A. Waterman was then connected in 1905 was not a mere sham. While illuminative of another question in the case, it might be well to quote here from the opinion of Judge Brand:

"Now it is perfectly plain to any candid person that the ordinary buyer pays little attention to such prefixes as 'L. E.' and 'A. A.' - an inattention upon which it is quite clear to me the defendant's purchase of the name depended. Dealers will, of course, know the difference very well; but they are privy to the fraud. It is the form in which the wares come to the final buyer that counts, and, while the defendant is not responsible for the spontaneous representation of dealers, it must not so mark or dress its goods as to create, or aid in, any misapprehension by the buyers. Florence Mfg. Co. v. L. E. Dowd & Co., 173 Fed. 73, 75, 101, U. S. A. 555; National Discuit Company v. Baker, (C. C.) 96 Fed. 135.

"The public means by the 'Waterman' pen the complainant's pen; indeed so the defendant concedes, being punctilious to avoid that name without its prefix. But the public by the very fact looks no further than the name. For myself, although I have used such pens for years, I am sure that I should not have had the least suspicion but that 'A. A. Waterman' pen was a 'Waterman' pen, and this record proves that many others have actually been so misled. Honest competition cannot exist until the defendant puts on its pens that they are not the original 'Waterman' pens, which they are not. Therefore a decree will pass forbidding the use of 'Ideal,' of 'Waterman,' and of 'A. A. Waterman & Co.', except in connection with the following phrase or its equivalent, all words to be written in letters of the same size, 'Not connected with the original 'Waterman' pens.' Dr. A. Reed Cushion Shoe Co. v. Lane, supra."

On appeal to the United States Circuit Court of Appeals, the decision of the District Court was so amended as to strike out the words, "not connected with the original 'Waterman' pens," and inserting in lieu thereof the phrase, "not connected with the L. E. Waterman Co.. (117 U. S. A. 31), and it was held that







confusion did arise from the use of the name "A. A. Waterman & Company," in the business of manufacturing and selling pens; that while defendant had a right to use the name, yet the complainant and the public had the right to insist that defendant should adopt a name whereby the public would not be misled and the complainant compelled to submit to unfair competition; that this result could be brought about by requiring defendant to use upon its products the words, "not connected with L. E. Waterman Co." This decision was affirmed, as stated, by the United States Supreme Court, 235 U. S. 86, because that court felt bound by the finding of fact of the lower court that A. A. Waterman held a pecuniary interest in the business.

In the case of L. E. Waterman & Company v. Standard Drug Co. & Teller, 120 U. S. A. 455, the court having before it on appeal the question of the propriety of an order of a lower court denying an application for a writ of attachment against Standard Drug Company and one Teller, referred with approval to the language used by Judge Hand in the case reported in 193 Fed. 247:

"The injunctive order appears to be based on the theory that the public understands 'Waterman' to signify the appellant's pens, and the evident purpose was to avoid confusion and deception of the public (Piez v. Horton Mfg. Co., 170 Fed. 872, 96 C. C. A. 41 (C. C. A. 8th Cir.), and so to protect the average customer, rather than discriminating dealer. It has been aptly said of the two names, L. E. Waterman Co., and A. A. Waterman & Co., in another case, that the ordinary customer would scarcely heed the difference between the initials 'L. E.' and 'A. A.'; he would be influenced by the name 'Waterman.'"

If the opinion expressed in the above case and in the other Waterman case referred to, that "the ordinary customer would scarcely heed the difference between the initials 'L. E.' and 'A. A.'" and that "he would be influenced by the name 'Waterman' is sound, what measure of relief would be afforded complainant by the mere juxtaposition of the phrase, "not connected with L. E. Waterman & Co."?



In the case of G. & C. Merriam & Co. v. Baalfield, 117 U. S. A. 245 (Webster Dictionary case), the language of which is quoted with approval in the Standard Drug Company case, supra, it was held that the defendant "must unmistakably inform the public that the article is of his production. \*\*\* He must so distinguish that 'no one with the exercise of ordinary care can mistake.'"

In J. E. & W. L. Chapman v. L. E. Waterman Company, 163 N. Y. S. 1059, the facts in main particulars are similar to those in the present case. In that case the court recites the history of A. A. Waterman in his connection with complainant and his various dealings thereafter with persons showing deliberate efforts on his part to realize upon the fact that he bore a surname similar to that of the founder of the L. E. Waterman Company, and the court in effect held that he had pretended to form a copartnership with others for the manufacture and sale of fountain pens, the agreement being such that he would shortly cease to have any interest in the firm, which would belong exclusively to his other partners who had furnished all of the funds therefor; that he, Waterman, had granted the exclusive right to these parties to use his name in the manufacture of pens in perpetuity, and that the partnership agreement was a mere sham and fraudulent device to permit his partners, who supplied the necessary money, to use the name Waterman; that though any man has an absolute right to use his own name honestly in a business conducted by himself, he would not be permitted by any fraudulent artifice to mislead the public; that complainant would not be restrained, as prayed by the Chapmans, and that the latter had no right whatsoever to use the name Waterman." The court said:

"The various concerns that Arthur A. Waterman has formed have not been prosperous, nor has he contributed to the value of the name. One after another has gone out of business, owing to financial embarrassment. The evidence in this case is overwhelming that a substantial trade has been thus diverted from customers, through the use of the name 'Waterman'







by the plaintiffs, having purchased pens of the latter's make in the belief that they were procuring pens of the defendant's manufacture.

"Where one has built up a good will and reputation for his goods or business, he is entitled to all the benefits therefrom. Such good will is property, and equity will afford relief from its invasion by another by unfair use of the name. No one has a right to avail himself of another's favorable reputation in order to sell his own goods. A demand created by advertisement belongs to the advertiser. These are all elementary principles of law, which have been violated by the plaintiffs in the fraudulent use of the name 'A. A. Waterman' and 'A. A. Waterman & Co.' The further use of that name by them should be restrained."

This case was decided in 1917 and is the latest "Waterman" case to which our attention has been called dealing with the question under consideration. It will be noted that the cases above referred to deal only with the question of unfair competition. Nothing was determined therein as to the validity or invalidity of trade-marks.

We have referred at some length to the several decisions in the Waterman cases. In substantially all of them, both in lower courts and courts of review, it was held that the conduct of A. A. Waterman in his numerous efforts to grant a right to use his name in the manufacture and sale of fountain pens constituted a fraud upon the rights of complainant. Certain courts seem to be of the opinion that by adding the juxtaposed phrase in question, some relief might thereby be given complainant; but those cases were based upon a finding that A. A. Waterman retained a pecuniary interest in the business conducted under his name. This is not the fact here, where, as in the case last above cited, it appears that his vague pecuniary connection with defendant was nominally retained for only a short time. A. A. Waterman's history as related to these matters is such that we feel quite certain the juxtaposition of the phrase "not connected with L. E. Waterman & Company" would not serve in any material way to protect complainant. If it be true, as is often held, that the ordinary customer would not distinguish between the use of the initials



"L. E." and "A. A." then the relief granted complainant in the decree would seem to add confusion to an already much confused situation. It is our opinion that the only adequate relief possible to award complainant is to absolutely enjoin the use by defendant of the name Waterman in connection with its manufacture and sale of fountain pens. This is not a case where a person is seeking honestly to use his own name in a business conducted by himself, and we do not think that the several Waterman cases, when carefully examined, are in conflict with this holding.

Counsel for defendant say that the record here presents for decision but two important questions, the first of which is, "Had A. A. Waterman a right in law to use his name in marketing fountain pens?" Our answer is that we do not believe that this question is directly involved in the case. But had it been, our answer would be, "Yes, if he used his name honestly and in such manner as not to deceive the public." The second question is, "Has the name 'A. A. Waterman' been used in a proper way by appellee?" This, in our opinion, is the real question in the case, and our reply is that the decree correctly answers the question in the negative.

How many purchasers of pens in the natural course, because of the juxtaposed words required by the decree, would be able to determine who was the actual producer of a pen well known to the public and in the trade as the "Waterman" pen? The decree requires only that the purchasing public be informed that pens offered for sale by defendant were not those produced by L. E. Waterman Company. The substantial difference is only in the use of the initials "A. A." and "L. E." and only in rare cases would the additional words required by the decree serve to protect a purchaser of fountain pens who desired to purchase pens produced by complainant.

It is urged that the trial court erred because it



1. The first of these is the fact that the United States has a long and distinguished record of support for the principles of self-determination and independence of peoples. This record is reflected in the many treaties and agreements which the United States has entered into with other nations, and in the many acts of kindness and assistance which it has rendered to those who are struggling for freedom.

2. The second of these is the fact that the United States has a strong and effective system of government. This system is based on the principles of democracy and the rights of the individual, and it has proved itself to be one of the most effective and efficient systems of government in the world.

3. The third of these is the fact that the United States has a large and powerful military and naval force. This force is one of the most modern and best equipped in the world, and it is capable of defending the United States and its interests against any possible threat.

4. The fourth of these is the fact that the United States has a large and powerful economic system. This system is based on the principles of free trade and competition, and it has proved itself to be one of the most effective and efficient systems of economic organization in the world.

5. The fifth of these is the fact that the United States has a large and powerful cultural and scientific system. This system is based on the principles of free thought and expression, and it has proved itself to be one of the most effective and efficient systems of cultural and scientific organization in the world.

6. The sixth of these is the fact that the United States has a large and powerful diplomatic system. This system is based on the principles of peace and cooperation, and it has proved itself to be one of the most effective and efficient systems of diplomatic organization in the world.

7. The seventh of these is the fact that the United States has a large and powerful educational system. This system is based on the principles of free education and the rights of the individual, and it has proved itself to be one of the most effective and efficient systems of educational organization in the world.

8. The eighth of these is the fact that the United States has a large and powerful judicial system. This system is based on the principles of justice and the rights of the individual, and it has proved itself to be one of the most effective and efficient systems of judicial organization in the world.

9. The ninth of these is the fact that the United States has a large and powerful executive system. This system is based on the principles of efficiency and the rights of the individual, and it has proved itself to be one of the most effective and efficient systems of executive organization in the world.

10. The tenth of these is the fact that the United States has a large and powerful legislative system. This system is based on the principles of democracy and the rights of the individual, and it has proved itself to be one of the most effective and efficient systems of legislative organization in the world.



failed to award an accounting in favor of the plaintiff, as recommended by the master. For the defendant it is insisted that an accounting may not be awarded in every case, even though the circumstances are such as to justify the issuance of a restraining order. The main contention on the question of accounting is that complainant was guilty of such laches as to deprive it of this claimed right.

In Worcester Brewing Corp. v. Ruster & Co., 157 Fed. 217, the court said:

"... as it stands, the equity of the complainant as to an accounting is especially weakened by the fact that the expenditures made by the respondent in pushing its business were largely after the complainant had full notice of the infringement in the manner we have shown. The delay was not very long, a little more than a year, but on the question of laches, the length of the delay is more or less important in connection with the other circumstances."

In H. K. Fairbank Co. v. Luckel, King & Cuka Soap Company, 106 Fed. 493, the court said:

"In the present case the complainant had, from the first, full and ample knowledge of the infringement, and it may be said to be doubtful whether a fraudulent intention existed upon the part of the defendant. In such case, laches for a much shorter period than that which intervened in this case have been held sufficient to justify the denial of relief by way of accounting. In the leading case of Harrison v. Taylor, 11 Jur. (N. S.) 408, cited with approval in McLean v. Fleming, 96 N. E. 243, 24 L. Ed. 828, it was held that the failure of the complainant to assert his right, as against an infringer of his trade-mark, within a year from the date of the discovery of such infringement, was such laches as to bar his right to recover profits."

The above cases adequately express the rule as announced in many decided cases. Marandaz v. Hall, 123 U. S. 314.

Assuming, as we do, that the use of the name Waterman on the part of the defendant was unfair competition and that it infringed the trade-marks, we are not ready to hold that complainant is entitled to an accounting where it appears, as we believe it does here, that it has been guilty of laches. Defendant was organized in 1906, and it sold its products in competition with

[illegible][illegible]

1. The first is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed changes to the law of the United Kingdom in relation to the treatment of the British Commonwealth countries. The Commission is therefore unable to make any recommendations at this time.

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1. The purpose of this report is to provide a summary of the results of the investigation conducted by the Department of the Interior, Bureau of Land Management, in response to the request of the Department of the Army, Corps of Engineers, for information regarding the status of the land owned by the Department of the Interior, Bureau of Land Management, in the vicinity of the proposed site of the new airport at Fort Worth, Texas.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

THE UNIVERSITY OF CHICAGO

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

[illegible]

complainant for many months before the bill was filed in 1911. There is some evidence that complainant was unaware of the conduct of defendant until a few weeks before the filing of the bill. There are, however, undisputed facts in the record from which it might reasonably be inferred that complainant knew or should have known long before the suit was begun, of defendant's competition with it.

"Acquiescence of long standing is proved in this case, and inexcusable laches in seeking redress, which show beyond all doubt that the complainant was not entitled to any account nor to a decree for gains or profits." Molcan v. Cochran Fleming, 96 U. S. 245.

It is our opinion that the present case comes within the rule laid down in cases cited by complainant, and that this is a case where the evidence shows that there has been an infringement of complainant's trade-marks, and that defendant has operated its business in unfair competition with complainant. Hanover Star Milling Co. v. Matcalf, 240 U. S. 403.

While there is some evidence, and the master found, that the defendant had used efforts to prevent the sale of its products as and for that produced by complainant, this fact does not relieve defendant from responsibility for consequences which naturally and almost necessarily followed from the manner in which it applied and used the name "Waterman" in its business.

Other questions are discussed, as where it is said that defendant's product was superior in quality, and that defendant had acquired the exclusive right to manufacture a so-called self-filler pen. On these questions we deem it sufficient to say that the evidence shows that both defendant and complainant manufactured and sold fountain pens which, though somewhat different in design, were intended to serve an identical purpose and which generally were similar in appearance. They were distributed to some extent in the same markets and were directly in competition.

The questions involved here have in one form or another







been passed upon by other courts, which have held that complainant had been a victim of repeated attempts, growing out of the conduct of A. A. Waterman, to profit by the trade reputation acquired by it, and while complainant seems to have been nominally successful in these cases, it has, even to the present time, been subjected to the same unfair competition and infringements of its trade-marks. We believe that equity has, and that it should exercise, the power to prevent further such imposition upon complainant.

The decree of the Superior court will be reversed and the cause remanded to that court, with instructions to enter a decree in the cause in accordance with the recommendations of the master, except that the decree should not provide for an accounting against the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Hatchett, J., concur.

[illegible]

PEOPLE OF THE STATE OF ILLINOIS,  
by Robert H. Crows, State's  
Attorney of Cook County, Illinois,  
as informant,  
Defendant in Error.

vs.

PETER A. MORTENSON and CHARLES  
E. CHADSEY,  
Plaintiffs in Error.

WRIT OF

CIRCUIT COURT OF  
COOK COUNTY.

229 1A. 630

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out by Peter A. Mortenson to secure the review of the record in the case of the People of the State of Illinois by Crows v. Mortenson and Chadsey, respondents in the Circuit Court of Cook County. The same case was before this court on an appeal from the final judgment entered at nisi prius on November 8, 1919. That appeal was docketed in this court as general number 25815.

Defendant in error Chadsey made a motion to dismiss the appeal for reasons stated in suggestions filed in support of his motion. Counter suggestions were filed by plaintiff in error Mortenson on March 26, 1920, and upon consideration by this court the motion of Chadsey was granted and the appeal dismissed.

This writ of error was sued out on January 12, 1922. The final judgment in the trial court, as already stated, was entered November 8, 1919. After the writ was sued out here, a motion by plaintiff in error that he be given permission to withdraw the record filed in cause number 25815 for the purpose of filing the same in this cause was granted. It was afterward so filed, and the only assignment of error appearing in the record is the assignment attached to this record of the appeal case.

40794 • J. Neurosci., September 24, 2008 • 28(39):40788–40794

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

[illegible]

• THE NEW YORK TIMES MAGAZINE, NOVEMBER 19, 1963, P. 100.

This bill of lading was used on the Robert A. Fortson  
to secure the release of the vessel in the case of the seizure  
of the cargo of Aluminum Oxide by United States Customs  
representatives in the Atlantic Ocean of Cook County. The same was  
not before this court on an appeal from the trial judgment  
entered in said trial on November 4, 1917. That appeal was  
decided in this court on general number 10012.

1. The above information was obtained from the files of the FBI, New York Office, and was furnished to the FBI, New York Office, on 10/10/61.

This copy of memo was used on January 14, 1968.  
The Miami newspaper in the initial report, as already stated, was  
entered December 10, 1967. When the copy was sent out here, a  
notice by Miami Herald in which it was given permission to allow  
some one named John in Miami Herald office for the purpose of  
taking the case in this case was included. It was believed an  
initial, and the only assignment of every agency in the Bureau  
in the conference. It was on this record of the agency case.



To this assignment of error, Chadsey, defendant in error, by severance, has filed pleas of the statute of limitations, res ad judicata, and release of error. To the plea of the statute of limitations plaintiff in error has filed three replications setting up:

First: That at the time the order of judgment in the trial court was entered, the statute of limitations applicable was three years and that the writ was sued out within that time.

Second: That on June 26, 1919, an order was entered by the trial court granting leave to the petitioner to file information; that this order entered into and made possible the rendition of the final judgment of November 8, 1919, in the trial court, and the plaintiff in error was therefore entitled to three years instead of two in which to sue out the writ.

Third: That prior to July 1, 1919, the time allowed by statute for suing out a writ of error was three years, and that the amendatory act of the General Assembly approved June 30, 1919, and in force July 1, 1919, reducing the time limit for suing out a writ of error from three to two years, was not adopted in conformity with certain provisions of the constitution of the State and is therefore null and void; and that according to the statute the plaintiff in error had three years and not two years in which to sue out the writ of error.

The replications point out that by filing a plea the defendant in error confessed error on the record. To each of these pleas the defendant in error demurred, and these demurrers raise the question which we regard as decisive of the case and which will make it unnecessary for us to consider other questions raised by the pleadings.

It is of course elementary to say that the writ of error, unlike an appeal, searches the whole record and that plaintiff in error may by this proceeding secure a review of



any final order or decree entered in the cause by the trial court, but we think that it must be held on this record that the order of June 26, 1919, by which leave was granted, is not reviewable on the record because it is only an interlocutory and not a final order, and because the plaintiff in error did not by objection or by motion to vacate, or otherwise, in the trial court question the propriety of that order.

Plaintiff in error in the trial court might have raised the question of the sufficiency of the petition for leave by demurring thereto or by motion to dismiss, or might have raised an issue as to the facts alleged in the petition by denying the same. If he had notice of application for leave, he might have preserved the question which he now raises in one of these ways, or not having notice, he might have preserved the question for review by making a motion properly supported to set aside the order granting leave after it was entered. The record shows that he did not do this. He did not in any way contest in the trial court the order entered granting leave to file the information, and not having contested it in the trial court he is not in a position here to assign error on it. People v. Lasse, 348 Ill. 187, and Bishop v. The People, 200 Ill. 33; People v. Union Elevated Ry. Co., 269 Ill. 212.

Nor is there merit to the further contention of the plaintiff in error that the act in force July 1, 1919, by which the time within which a writ of error might be sued out was reduced from three to two years, is void. This is now section 117 of the Practice Act. Plaintiff in error argues that the amendment is ineffectual for the sole reason that it therein states that the act of 1907 which it purported to amend was approved and in force July 1, 1907, while in fact that act was approved June 3, 1907, and went into force July 1, 1907. The Supreme Court of



and final order or decision entered in the name of the judge.  
court, but we think that it would be held on this record that the  
order of June 27, 1917, by which leave was granted, is not the  
decision on the record because it is only an interlocutory and  
not a final order, and because the question is even the not by  
appeal as to motion to vacate, or otherwise, in the trial  
court during the pendency of that order.

Finally in view of the fact that leave has been  
the question of the propriety of the position for leave by  
denying leave as to motion to dismiss, or might have raised  
an issue as to the right claimed in the position by having the  
leave. It is not a matter of application for leave, he might have  
granted the motion which he now raises in one of those ways.  
or not having said, he might have granted the motion for  
leave by making a motion previously mentioned to set aside the  
order granting leave which it was entered. The record shows that  
he did not do this. He did not say any motion in the trial  
court the order entered granting leave to file the application.  
and was denied, and if in the trial court he is not in a  
position to say he was denied to it. *People v. Lewis*, 101 N.Y.  
1917, and *People v. Lewis*, 101 N.Y. 1917.

It is not a matter of the further continuation of the  
plaintiff in error that the act is taken July 1, 1917, by which  
the time within which to file the motion was set out and the  
motion was taken on two points, as well. This is not a motion  
on the motion to dismiss. The motion is taken upon the motion  
in *People v. Lewis* that the order entered in the trial court  
and one of 1917 which is mentioned in record was reversed and in  
leave only *People v. Lewis*, 101 N.Y. 1917, which is taken that it was reversed and in  
1917, and only that *People v. Lewis*, 101 N.Y. 1917.



this State, when similar questions have been raised, has decided contrary to the contention of the plaintiff in error. People v. Penman, 371 Ill. 82; Otis v. People, 196 Ill. 542; Eaton v. People, 289 Ill. 512; People v. Van Bever, 248 Ill. 136.

It follows that the suit of the plaintiff in error is barred by the statute of limitations as pleaded, and irrespective of the merits must be dismissed.

WRIT OF HABEAS DISMISSED.

McSurely, J. J., and Dever, J., concur.

the fact, when similar provisions have been retained, and having  
reference to the contents of the bill in error. Section 7.  
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It is also to be noted that the bill of the committee in error is  
passed by the House of Representatives as passed, and irrespective  
of the action which is required.  
THE HOUSE OF REPRESENTATIVES.

RECEIVED, . . . . .

CLARA K. HECHT and FRANK  
A. HECHT, Jr., as Executors  
of the Last Will and Testament  
of Frank A. Hecht, Deceased,  
Defendants in Error,

vs.

ERNEST SCHUTTE et al.,  
Plaintiffs in Error.

ERROR TO CIRCUIT COURT  
OF COOK COUNTY.

229 I.A. 630

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is a writ of error brought by Marie Bruder individually and as executrix of the estate of her deceased husband, Michael Bruder, to review the record in a suit in equity to foreclose a mortgage on certain premises, which mortgage purported to secure the rent reserved under the terms of a lease of which the mortgage was a part.

The case was heard by the chancellor, upon exceptions to the master's report, which were overruled and decree of foreclosure and sale entered. The decree has been executed and judgment entered in the amount of the deficiency arising upon that sale. Two controlling questions are argued upon the assignment of errors: First, whether the mortgage as a matter of fact was void as against the complainant, and, second, whether the court erred in confirming the report of the master as to the amount of rent due under the terms of the lease.

There is little conflict as to the evidence. The original instrument upon which the complainant's suit is based has been certified to this court for our inspection. The instrument is partly printed, partly in longhand writing and partly in typewriting. The printed part of the instrument is No. 1262 for "Lease of Chicago Real Estate Renting Agents Association, Form No. 2 Revised." It appears from the whole writing that on January

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26, 1911, the complainant Frank A. Hecht, as party of the first part, demised and leased to Michael Bruder and Marie Bruder, his wife, certain premises situated in the city of Chicago, to be occupied as a hotel, saloon and general merchandise or mercantile business. The term of the lease was to begin on February 1, 1911, and end on the last day of January, 1926. The rent reserved was \$1000 a month, during a part of the time \$1250 a month, and for the remainder of the time \$1500 a month. This instrument is under seal and is signed by all the parties to it. Attached thereto is the certificate of a notary public under his hand and seal, that Michael Bruder and Marie Bruder appeared before him on February 15, 1911, and acknowledged that they signed, sealed and delivered the instrument. It is admitted that Marie Bruder did in fact sign the instrument, but the master found (and the finding is sustained by the evidence) that she did not in fact appear before the notary public at the time named, or at any other time, and acknowledge it.

On the back of this lease appears a notation, dated February 15, 1911, and signed by all the parties to the lease, in which it is mutually agreed that the rent shall be reduced to \$925 a month "during the first year only." The instrument was filed in the Recorder's office of Cook County on February 18, 1911, and at that time duly recorded.

In the body of the lease and in a blank which originally appeared in the printed part thereof is a written statement to the effect that the party of the second part (that is, Michael and Marie Bruder) create a lien or mortgage, to secure the prompt payment of the rent, on two certain pieces of real estate, one known as number 2145 Dayton street and the other as numbers 4411 and 4413 North Clark street. The party of the first part is authorized to enter upon and possess these premises to all intents and purposes



as owner thereof, without legal process, in case at any time during the term of the lease there shall be sixty days unpaid rent of the premises thereby leased. It is expressly stated that it is the intention to pledge, mortgage and encumber said properties for the prompt and faithful performance of all obligations incurred under the lease.

At the time the lease was executed Mr. and Mrs. Bruder, husband and wife, lived on the Dayton street premises. However, some two years prior to the beginning of this suit she moved away and vacated the premises, and no question about her right of homestead is therefore raised on the record. Michael Bruder, her husband, went into possession of the demised premises. On July 31, 1914, he died, leaving a last will and testament, which was admitted to probate and in which Marie Bruder was named as executrix. She qualified and has ever since acted as executrix.

Michael Bruder remained in possession of the demised premises up to the time of his death. His son, William Bruder, thereafter continuously remained in possession of the premises until some ten weeks after the bill of complaint was filed. He moved out July 15, 1919.

The premises which this lease purported to mortgage as security for the rent were owned by Marie Bruder. The evidence shows that she was born in Bohemia, that she came to America when about eighteen years of age, and in the same year married Michael Bruder. The master found that she is fairly intelligent and understands and speaks the English language. She signed the lease and she signed the written agreement reducing the rent for the first year - both times at the request of her husband. Her testimony is that her husband on each occasion stated that he was in a hurry; that she did not read the papers she signed before she signed them; that she asked her husband what the first writing was and he told



an owner thereof, with legal process, in case of any time during  
the term of the lease there shall be given any right of the  
premises therein leased. It is expressly agreed that it is the in-  
tention of the parties, heretofore and hereafter, to provide for the  
prompt and faithful performance of all obligations incurred under  
the lease.

At the time the lease was executed, it was intended, however,  
that it should be subject to the same provisions. However, some  
two years prior to the expiration of this lease it was agreed and  
vested in the premises, and no question about the right of possession  
is therefore raised on the record. Michael Butler, her husband,  
went into possession of the leased premises. On July 12, 1914, he  
died, leaving a wife and testament, which was admitted to prob-  
ate and in which said wife was named as executrix. The undivided  
half was then sold to the said

Michael Butler remained in possession of the leased  
premises up to the time of his death. His son, William Butler,  
thereafter continuously remained in possession of the premises until  
some ten years after the date of said death. He never paid  
July 12, 1914.

The premises which have been referred to herein as  
acquired for the time being by said estate. The evidence  
shows that the same were in 1904, and were used as a residence, when  
about fifteen years of age, and in the year 1904 Michael Butler  
Butler. The evidence shows that he is fairly intelligent and well edu-  
cated and capable of the kind of work. He owned the land and  
the other the other property for the year 1914 and the year 1915  
year - both of them in the year of the year. Her testimony is  
that her husband on each occasion stated that he was in a hurry;  
that she did not feel the same as she should before she entered them;  
that she called her husband when the first spring was not so cold



her that it was a lease but did not tell her that it contained the mortgage clause which conveyed her property. Her testimony indicates that she did not know that the lease contained this mortgage clause until her son William told her of that fact five months after her husband's death. It seems that as a usual thing her husband attended to her business for her; that when he told her to do anything she was accustomed to do it, and thus it came about that she signed the lease. Usually she did not read over papers that her husband placed before her, and when he told her to sign, she did so. She knew that he was conducting a saloon on the demised premises.

The master found, and the finding has been approved by the chancellor, that there is no evidence that her husband practiced any fraud, duress, or imposition on Mrs. Bruder in connection with the signing of the lease and the agreement on the back of it, or that she objected to signing the lease or agreement.

Plaintiffs in error contend that the mortgage provision in the lease was in fact void. They say that Mrs. Bruder supposed that she was signing a lease as a lessee of a saloon; that she had no knowledge that the paper she signed was also a mortgage on her individual real estate, situated in a different place, and in which her husband had no interest; that the essence of a mortgage is the intention of the mortgagor to create one, and that the creation of a mortgage is not accomplished until the mortgage is delivered as a mortgage. They point out that the mortgage provision of the lease contained no words of conveyance and that its literal terms were those of an equitable mortgage, and that particularly in such a mortgage is it true that the intention of the parties must control. They say that the manner in which the signature of Mrs. Bruder was obtained shows an adroit scheme on

her that it was a lease but did not tell her that it contained the mortgage clause which conveyed her property. Her testimony further stated that she did not know that the lease contained this mortgage clause until her son William told her of that fact five months after her husband's death. It seems that as a usual thing her husband attended to her business for her; that when he told her to do anything she was accustomed to do it, and thus it came about that she signed the lease. Usually she did not read over papers, that her husband placed before her, and when he told her to sign, she did so. She knew that he was conducting a business on the premises provided.

The master found, and the finding has been approved by the chancellor, that there is no evidence that her husband procured any title, interest, or suggestion on Mrs. Butler in connection with the signing of the lease and the agreement on the back of it, or that she objected to signing the lease or agreement. William is in error in stating that the mortgage provided

also in the lease was in fact void. They say that Mrs. Butler supposed that she was signing a lease as a lease of a school; that she had no knowledge that the paper she signed was also a mortgage on her husband's real estate, situated in a different place, and in which her name was not an interest; that the nature of a mortgage is the intention of the mortgagee to create one, and that the creation of a mortgage is not accomplished until the mortgage is delivered as a mortgage. They point out that the mortgage provided in the lease contained no words of conveyance and that the fiscal court gave it an equitable mortgage, and that particularly in such a mortgage it is true that the intention of the parties must control. They say that the manner in which the signature of Mrs. Butler was obtained shows an entire absence of

the part of her husband to defraud her, and insist that under the circumstances the signature of Mrs. Bruder was in effect a forgery.

We do not think that the facts justify such a conclusion. It is admitted that Mrs. Bruder signed the lease and by so doing obligated herself equally with her husband to see that the rent reserved for the demised premises was paid. By due process of law this obligation might have been made to attach to her property, whether the mortgage clause had been inserted or not.

The lease contained another clause which provided that she and her husband both waived service of process and gave the complainant the right, upon default in payment of the rent, to confess judgment for the amount due, waiving process, releasing errors, etc. She thus indirectly bound the property which by the mortgage clause was conveyed.

While the evidence shows that she did not read either the mortgage clause or the other provisions of the lease, she had an opportunity to do so, not only at the time she signed the original lease but afterwards when she signed the notation on the back of the lease providing for the reduction of the rent.

It further appears that on a subsequent occasion she went with her husband to complainant's office, when he was asked to and did execute and deliver to both of them a release deed by which he released his lien under this lease and subordinated it to a prior lien which was about to be placed upon the property by Mrs. Bruder in favor of the Kasper State Bank.

Again, the record shows without dispute that a short time after her husband's death she was advised by her son William that the lease contained this mortgage clause. So far as the record shows, she did not protest against it, and in no way, prior to the







filing of her answer in the present suit, did she ever claim that she was in ignorance of the existence of the mortgage clause in the lease or disavow it in any way. Nor can we, in weighing the evidence on this point, overlook the fact that the lease was recorded within one month after its execution, and that upon the death of her husband Mrs. Bruder as executrix of his estate came into possession of his personal property, which would include this lease.

Plaintiffs in error argue that Mrs. Bruder was not obligated, upon discovering the existence of this mortgage, to take any affirmative steps to repudiate it. They urge that it was void and that she had a perfect right to leave the assertion of her rights to such time as an attempt might be made to enforce its provisions. All this may be true, but it is beside the point.

In weighing the evidence it is, we think, material and proper to be considered that she did not act as a reasonable wife, who had been deceived and defrauded by her husband, would have acted under such circumstances.

While it is true that the finding of the master does not have the weight of the verdict of a jury, nevertheless, as he saw the witnesses and heard them testify, his finding, which has been approved by the chancellor, is entitled to some weight; and we do not think we can say that the finding is not sustained by the evidence.

Counsel for plaintiffs in error relies very much upon the case of Marden v. Dorothy, 160 N. Y. 39, and we have examined that case with some care. It was in the Court of Appeals of the State of New York upon appeal from the general term of that state. The Court of Appeals, unlike this court, has power

claim of her husband in the present suit, till she even claim that she was in ignorance of the existence of the mortgage claim in the house or wherever it is any way. Now even we, in weighing the evidence on this point, overlook the fact that the house was to be sold within one month after its execution, and that upon the death of her husband Mrs. Hunter as executor of his estate came into possession of his personal property, which would include this house.

Undoubtedly in error argues that Mrs. Hunter was not obligated, upon discovering the existence of this mortgage, to take any affirmative steps to repudiate it. They urge that it was void and that she had a perfect right to leave the execution of her rights to such time as an attempt might be made to enforce its execution. All this may be true, but it is beside the point. In weighing the evidence it is, we think, material and proper to be considered that she did not act as a reasonable wife, who had been deceived and defrauded by her husband, would have acted under such circumstances.

While it is true that the timing of the master does not have the weight of the verdict of a jury, nevertheless, as he has the witness and hears them testify, his timing, which has been approved by the chancellor, is entitled to some weight; and we do not think we can say that the timing is not sustained by the evidence.

Undoubtedly in error relies very much upon the case of *Hunter v. Hunter*, 107 S. E. 2d, and we have examined that case with some care. It was in the Court of Appeals of the State of New York upon appeal from the General Term of that state. The Court of Appeals, unlike this court, has power

to review only errors of law, not errors of fact. The opinion there states that it has been specifically found that "the plaintiff never intended to execute, and did not sign or deliver, any obligation, contract or conveyance whatever." The court therefore concluded that there was no act of the plaintiff, who there brought the suit, upon which any right or equity could be based in favor of the defendant mortgagees. In this important respect, therefore, that case is clearly distinguishable from this one. It is, however, interesting to note that the decision was by a divided court, two of the Judges voting for affirmance, two concurring, two dissenting and one not voting. Among the cases relied upon in one of the dissenting opinions is that of Gavagan v. Bryant, 83 Ill. 376. Other cases cited by plaintiffs in error, on which they rely, and which are also clearly distinguishable, are Green v. Wilkie, 98 Ia. 74, and Delfosse v. Rendall, 283 Ill. 301, which are cases arising out of suits on negotiable instruments, the last named depending on the proper construction of section 10 of the Negotiable Instruments act. These cases are therefore clearly inapplicable.

We conclude that the decree was proper under the finding of fact that there was no fraud; but even had fraud on the part of the husband been shown, we think that Mrs. Bruder, in the face of her undisputed negligence in failing to read the document, would be precluded as against the complainant from setting up that defense under the familiar rule of law that where one of two persons must suffer loss, he who by his negligent conduct made it possible for the loss to occur must bear it. Anderson v. Wagne, 71 Ill. 20; M. C. R. R. Co. v. Phillips, 60 Ill. 190; W. U. Cold Storage Co. v. Bankers Nat'l Bank, 176 Ill. 260.

Plaintiffs in error contend that the complainant was







also negligent in that he failed to make specific inquiry of Mrs. Bruder, who was at that time in possession of one of the premises. There is language in Marden v. Dorothy, supra, which would seem to justify that argument; but we do not think it has ever been held in this state - and we think it ought not to be - that one taking an instrument of this sort in the usual course of business is required to exercise any such degree of diligence. The first question on the record must therefore be decided against plaintiffs in error.

It remains to consider whether the court erred in approving the finding of the master as to the amount of rent due under the lease. Plaintiffs in error do not deny that the amount found due is the correct amount, provided the terms of the lease are in force, but they set up an alleged oral agreement with Willial Bruder, son of Michael Bruder, made, as alleged, subsequent to the death of his father, whereby it was agreed that the rent for the premises should be reduced to \$400 a month. With reference thereto the master found that in January, 1916, William Bruder called on the complainant at his office, said that he was going to move; that \$400 a month rent was about all he could pay, and that the complainant orally agreed with him to let him stay until he got ready to tear down the building, provided William Bruder would pay \$400 a month. The master found, and after a careful examination of the evidence we agree with the finding, that there was no agreement between Mr. Hecht and William Bruder that Hecht would remit the balance of the rent due under the lease; that as a matter of fact the arrangement between them was never fully executed and did not modify the lease.

The finding of the master does not have the weight of the verdict of a jury. We have read with care the correspondence

also mentioned in that he failed to make specific inquiry of him.  
Myer, who was at that time in possession of one of the papers.  
There is evidence in *Marion v. Harrison*, which would seem to  
justify that statement; but we do not think it has been made  
in this case - and we think it ought not to be - that one taking  
an instrument of this sort in the usual course of business is re-  
quired to ascertain any such record of title. The first ques-  
tion on the record must therefore be decided against Harrison  
in error.

It remains to consider whether the same error in ap-  
plying the finding of the master as to the amount of rent due  
under the lease. Harrison's answer is not only that the  
amount found was in the correct amount, applied the terms of the  
lease was in error, but also set up an alleged oral agreement with  
William Hester, son of Michael Hester, made, as alleged, subsequent  
to the date of the father, whereby it was agreed that the rent for  
the premises should be reduced to \$100 a month. With reference  
therefore the master found that in January, 1911, William Hester  
called on the defendant at his office, said that he was going to  
move; that that a month rent was about all he could pay, and that  
the defendant readily agreed with him in his own mind. He  
got ready to leave for the building, provided William Hester would  
pay with a month. The matter found, and after a certain number  
of the evidence we agree with the finding, that there was an  
agreement between W. Hester and William Hester that there would  
rent the balance of the term for the same the lease; that in a matter  
of fact the agreement between them was already executed and  
did not modify the lease.

The finding of the master does not make the finding of  
the verdict of a jury. To have said that was the consequence

which passed between Mr. Hecht and William Bruder in regard to the payment of rent, and from which it is argued an agreement to reduce the rent to \$400 a month may be inferred. These letters show an agreement by which William Bruder was to be allowed to stay upon the premises upon the payment of that sum, but do not establish any agreement by which the provisions of the lease were to be modified. It therefore becomes unnecessary for us to discuss the question raised as to whether a written lease under seal may be modified in that way.

The decree entered was proper, and we think the only one that could have been properly entered under the evidence; it will therefore be affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

which passed between Mr. Hoole and William Hunter in regard to the  
payment of rent, and from which it is argued an agreement to reduce  
the rent to \$100 a month may be inferred. These letters show an  
agreement by which William Hunter was to be allowed to stay upon  
the premises upon the payment of that sum, but do not establish  
any agreement by which the provisions of the lease were to be  
modified. It therefore becomes unnecessary for us to discuss the  
question raised as to whether a written lease could in any way be  
modified in that way.

The lease entered was proper, and we think the only  
one that could have been properly entered under the statute; it  
will therefore be affirmed.

Respectfully,  
J. L. and Son, J. L. Son.



IN THE MATTER OF EMMA LEWIN,  
arrested at the suit of  
Paul W. Tatge, Administrator  
of the estate of EDWIN LEWIN,  
deceased,

EMMA A. LEWIN,  
Appellant,

vs.

PAUL W. TATGE, Administrator  
of the estate of Edwin A. Lewin,  
deceased,  
Appellee.

APPEAL FROM

COUNTY COURT OF  
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by petitioner in the County Court from an order of that court which remanded petitioner to the custody of the Sheriff of Cook County.

The petitioner having been arrested on a capias ad satisfaciendum, sought to be released from such arrest in the County Court of Cook County under the provisions of the Insolvent Debtor Act, Cahill's Revised Statutes 1921, chapter 72, page 1945. Pursuant to the provisions of section 6 of that act, she presented her schedule and submitted to an examination as to her assets. The examination apparently convinced the trial court, as an examination of her evidence in the record convinces us, that the schedule was not a truthful one, and that as a matter of fact she had disposed of a part of her property with the intention to defraud her creditors. Under these circumstances the court entered the proper order. A truthful schedule was a condition precedent, under the provisions of the statute, to her right to a release.

Appellant complains that the court found in the order that malice was the gist of the action in which the judgment was rendered, upon which the capias issued against her. The

IN THE COURT OF THE DISTRICT OF COLUMBIA  
Paul W. Tamm, Administrator  
of the Estate of John Edgar Hoover,  
Deceased,

Appellee.

Appellant.

DOOR COUNTY.

Paul W. Tamm, Administrator  
of the Estate of John Edgar Hoover,  
Deceased,  
Appellee.

MR. JUSTICE MATTHEW D. BARNETT: THE COURT.

This is an appeal by petition in the County Court from an order of that court which remanded petitioner to the custody of the sheriff of Cook County.

The petition recited that petitioner was a resident of

Chicago, Illinois, and that he was released from custody in the County Court of Cook County under the provisions of the Insolvency Act, Chapter 11, Section 10, of the Statutes of Cook County, Illinois, in 1913.

Petitioner is the petitioner of section 10 of that act, and has presented for execution and collection an application as

set forth in the petition. The petition apparently contained the trial record, as an examination of the record in the record book shows that the petition was not a certified copy, and that as a matter of fact the petition was a part of the proceedings with the information in relation to the petition. Under these circumstances, the petition was not a proper one.

Accordingly, the petition was not a proper one, and the petition was not a proper one, and the petition was not a proper one.

Accordingly, the petition was not a proper one, and the petition was not a proper one.

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Accordingly, the petition was not a proper one, and the petition was not a proper one.

burden of proof under the law was upon appellant to establish that malice was not the gist of that action. Jernberg v. Mix, 199 Ill. 254. She introduced no evidence on that material issue and the court was therefore justified in making the finding.

The order is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

burden of proof must be upon appellant to establish that matter was not the gist of the action. Turner v. Hill, 100 Ill. 281. The introduction of evidence on that matter alone and the case was therefore decided in favor of the defendant.

The order is affirmed.

REVEREND.

Respectfully, V. V. and Mary, U. S. County.



152 - 27628.

PETER G. MANUSOS, for use of Mid-West  
Collection Bureau, a corporation,  
Appellee,

vs.

GREAT LAKES TRUST COMPANY, a corpora-  
tion,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

229 I.A. 631<sup>2</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant was a garnishee defendant in the trial court. Its answer set forth that at the time of the service of the garnishee summons, it had no property, rights, credits, etc., of the judgment debtor in its possession. Plaintiff garnisher was given time to contest the answer, and later he made a motion to strike it. The record indicates that the motion was granted but that the order to strike was not in fact entered.

An order was entered, however, requiring the garnishee to file an additional answer in five days. This the garnishee did not do, and on August 12, 1921, its default was entered and final judgment in favor of the garnisher for the full amount of his claim, namely, \$141.42, was entered. The garnishee did not have actual notice of this judgment until the fifteenth day of September thereafter.

On the following day it made a motion to vacate the judgment. This motion was set for hearing on September 23, 1921, and at that time appellant presented its verified petition in support of the motion. This petition alleged that the garnishee, as was its custom in such cases, filed its answer and instructed one of its employees to watch the matter; that this employee assumed that the answer was all that was necessary; that defendant supposed the matter was closed, and so thought until informed of the judgment by a letter from the attorney for the

*J. Polym. Sci. Part A: Polym. Chem.* **37**, 109–116 (1999)

It is the policy of the Department of the Interior to provide for the maximum protection of the public interest in the disposal of the property of the United States. The Department is committed to the principle that the public interest is best served by the sale of property at the highest possible price. The Department is also committed to the principle that the sale of property should be conducted in a fair and equitable manner. The Department is committed to the principle that the sale of property should be conducted in a transparent and accountable manner. The Department is committed to the principle that the sale of property should be conducted in a timely and efficient manner. The Department is committed to the principle that the sale of property should be conducted in a manner that is consistent with the public interest.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a front organization for the CIA.

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On 11/11/1961, the following information was received from the Bureau of the Census, Washington, D.C.:

These results suggest that the use of a single, standard, and simple test may be sufficient to detect the presence of a significant difference in the mean of a continuous variable between two groups. However, the use of a single, standard, and simple test may not be sufficient to detect the presence of a significant difference in the mean of a continuous variable between two groups if the data are not normally distributed. In such cases, the use of a nonparametric test, such as the Mann-Whitney U test, may be more appropriate.

postscript: 2007-2008: 100% increase in number of corrections and 50% more

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garnisher, received September 15, 1921. The petition further set up facts which, if true, showed that it had not at the time of the service, nor thereafter, any property of any kind in its possession which would render it subject to garnishment.

At the suggestion of the court, an amended petition was filed substantially the same as that of September 23rd but correcting a supposed technical defect in the answer, and the court entered an order that garnishee might file an amended petition in support of its motion to vacate upon payment of \$25 to the attorney for plaintiff. Appellant filed the amended petition but refused to pay the \$25, and because of appellant's refusal to pay this sum of money, the court, on October 7, 1921, entered an order striking the amended petition of the garnishee from the files and denied the motion of the garnishee to vacate and set aside the judgment of August 12, 1921. This appeal followed.

Appellant here insists that the court was without jurisdiction because of a defect in the affidavit for garnishment, in that the party making the affidavit did not state that she was the agent in that behalf of the judgment creditor. Inasmuch, however, as the garnishee answered and did not raise this question in any way in the trial court, we think the contention is without merit. Ikorn for the use, etc., v. Coke E. Wallace, 88 Ill. App. 662; Commercial National Bank of Chicago v. Leroy Payne for the use, etc., 161 Ill. 313.

We think the court erred, however, in entering a judgment by default as against the defendant garnishee while its answer was on file, in view of the fact that no order had been entered striking it, and would not hesitate to reverse for that reason, if the judgment were before us, but as a matter of fact, this appeal is not from that judgment.

provided, revised November 14, 1921. The original edition  
 was in two volumes, 12.5 cm., bound in 1/2 cloth and 1/2  
 leather. The second, revised edition, was revised by the  
 author in 1921 and is bound in 1/2 cloth and 1/2 leather.  
 In the present edition the author has revised the  
 text of the original edition in many places, and has  
 added many new illustrations. The new edition is  
 bound in 1/2 cloth and 1/2 leather. The author has  
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We also think that the court erred in entering an order requiring the garnishee to pay the sum of \$25 to the attorney for plaintiff, as a condition precedent to its filing an amended petition. Such an order clearly exceeded the limits of reasonable discretion, as has been held in a similar case, Drinkwater v. Davidson, 90 Ill. App. 9, and the allowance of such fees to an attorney not a party to the suit has been disapproved by the courts of this state in numerous cases. Anderson v. Steger, 173 Ill. 113; McMullen v. Reynolds, 309 Ill. 504; Montgomery et al. v. Pine Savings and Trust Co. et al., 290 Ill. 407.

Although more than thirty days had elapsed from the date of the judgment, we think the Municipal Court, under the facts as disclosed by this record (and by the petition) and in the exercise of its equitable powers, should have set the judgment aside. It is suggested in opposition to this that the garnishee was negligent, but we do not think that it was inexcusably so under all the circumstances.

For the reasons indicated, the order appealed from will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Dever, J., concur.

1. The first of these is the fact that the party which is objecting to the  
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162 - 27638.

FLORENCE M. MCCARTHY,  
Appellee,  
vs.  
HANNAN MCCARTHY,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

229 I.A. 631<sup>5</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for plaintiff in the sum of \$1700 entered upon the verdict of a jury for that amount after motions of defendant for a new trial and in arrest of judgment had been overruled.

Plaintiff is the brother of defendant, who is his sister. He lived in St. Louis and she resided with her mother in Chicago. At various times from the year 1902 until 1909, plaintiff lent to his sister in small amounts a total sum, as shown by the evidence, of at least \$4,810.

In response to a letter from plaintiff dated June 25th, requesting a remittance of \$3,000, defendant on July 6, 1911, through Snydercker & Company, mortgage bankers in Chicago, sent to plaintiff a remittance of \$2450.

The questions of fact submitted to the jury were, whether any balance was due, and, if so, how much.

The suit was begun July 1, 1916. Defendant filed a plea of non-assumpsit November 15, 1916. June 17, 1921, Defendant asked leave to file a special plea of the statute of limitations, which was denied, but thereafter, leave so to do having been given, she filed a plea that the cause of action did not accrue to plaintiff at any time within five years next before the commencement of the suit.

The first contention of defendant here is that the undisputed evidence shows that the claim of plaintiff was barred

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by the statute pleaded. Appellant says that as plaintiff sent the money to her for safe-keeping, the cause of action would not accrue until a demand was made, and she assumes such a demand was made in plaintiff's letter of June 28, 1911, in which the request for a remittance of \$3,000 was made. Plaintiff, however, at that time did not demand payment of the whole account, at least as he understood it, and we think that request could not be construed to constitute such a demand as would justify the interposition of the plea. As defendant's argument is based upon the theory that such demand was made at that time, the contention must be held to be without merit.

Defendant's next contention is that the evidence shows that there was an accord and satisfaction. He says that the payment of July 8th of \$2450 was accompanied by a letter from her stating that this "squared" the account. This statement is not sustained by the record. On the contrary, it affirmatively appears that defendant wrote plaintiff several days after the check had been sent stating that the account was "squared" by it. This second contention is therefore also without merit.

It is next argued that the court erred in permitting a witness to give evidence over defendant's objection tending to show that interest had accrued on the various balances in defendant's hands from time to time, amounting to \$1471.53, and like error was made, it is urged, in giving, at the request of plaintiff, an instruction to the jury on that subject. This contention would be worthy of most serious consideration if it did not clearly appear from the verdict rendered that the jury did not allow any interest to plaintiff. It appears interest was not allowed. Defendant was therefore not injured by these

THE COURT OF APPEALS, NEW YORK, has affirmed the judgment of the Supreme Court, New York, in the case of *People v. [Name]*, No. [Number].

alleged errors.

Other instructions given are criticized but we do not think there was reversible error in any of them.

It is next claimed that the verdict is excessive. The evidence is voluminous and conflicting. We have examined it with considerable care, and while the amount for which the jury returned a verdict is not the amount for which we would make a finding, we do not think that we can say that it is clearly and manifestly against the weight of the evidence. We think substantial justice has been done, and the judgment will therefore be affirmed.

AFFIRMED.

McSurely, F. J., and Dever, J., concur.





MERCHANTS & MANUFACTURERS SECURI-  
TIES CO., a Corporation,  
Appellee,  
vs.  
HOLTON SALES COMPANY, INC.,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

229 I.A. 69

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order entered by the trial court on January 7, 1922. This order denied a motion theretofore made by the defendant to set aside a judgment entered by confession on a promissory note which contained a power of attorney authorizing the confession of the judgment. The judgment was for \$3,405.40 and costs. It was entered on the 22nd day of December 1921.

A motion to vacate this judgment was made January 6th thereafter, and was on that day denied. On the following day the defendant made another motion that the order of the day previous should be set aside, and this motion was also denied. Defendant then made a motion that the judgment of December 22nd be vacated. This motion also was overruled and from the order entered upon that motion this appeal is prosecuted.

Two affidavits were submitted in support of the motion. One was the affidavit of R. W. Vanier, who is the attorney of record for defendant, which was subscribed and sworn to by him "to the best of his knowledge, information and belief" on January 5, 1922. The other affidavit was subscribed and sworn to by Edward F. Munn, the president of the defendant corporation, on January 5, 1922, and was filed on the following day. These affidavits are not entirely consistent with each other as to the facts stated.

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1. *Journal of the American Medical Association*, 1990; 263: 1025-1028.

The above information was obtained from the records of the Federal Bureau of Investigation at Washington, D.C., dated January 7, 1968.

JANUARY 7, 1968

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THE FOLLOWING INFORMATION IS CONTAINED IN THE FILE OF THE  
U.S. DEPARTMENT OF JUSTICE, AND IS BEING FURNISHED TO YOU  
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OF SUCH INFORMATION.

The note upon which judgment was entered was for the sum of \$5,000, made at Chicago, Illinois, September 16, 1921. It was executed "Holton Sales Company, Inc., By Edw. F. Mumm, Pres." By its terms the maker promised to pay the amount of the note to the order of Frank Holton & Company, at 314 Marquette Building, Chicago, with interest at 7 per cent per annum after date until paid. The note, on the back thereof, bears the endorsement of Frank Holton & Company, By C. C. Ketherton, Secretary.

The affidavit of Mr. Vanier states that said Edward F. Mumm was not, at the time of the execution of said note, the president of the defendant corporation, and the affidavits deny that the defendant corporation ever made or delivered the note, (apparently for that reason.) The affidavit of Mr. Mumm, however, which was made on the following day, sets up that he is the president and duly authorized agent of the defendant, and makes his affidavit in its behalf, and this affidavit does not deny that Mumm was, at the time of the execution of the note, the president of the company. This would seem to have been a matter particularly within the knowledge of Mumm, and in view of the fact that he fails to deny that he was the president of the corporation at the time the note was executed, and the further fact that the affidavit of Mr. Vanier is made only on information and belief, we think the trial court was justified in concluding that defendant had not made out its defense on that ground.

The affidavits further state, as another defense, that Frank Holton & Company never received any consideration for the note, but as it clearly appears prima facie from the record that the plaintiff is a holder of the note in due course, this point would be immaterial unless the affidavits should further aver that plaintiff took the note with knowledge of facts putting it upon notice of the defendant's rights.







Another supposed defense set up in the affidavits is that the endorsement which appears upon the note was made without authority, and it is averred that since this is so, plaintiff is not, in fact, the legal owner of the note. It is not denied by the affidavits that C. O. Metherton, who endorsed the note in payee's name, was, in fact, the secretary of the payee company, but it is argued that the secretary of a corporation, "except where he is expressly vested with authority or where he has been apparently clothed with authority so to do, has no power to execute negotiable paper, such as bills, notes or checks, or to indorse such paper even for transfer." Citing 3 Fletcher's Encyclopedia Corporations, p. 3254, Sec. 2076. But this general rule is subject to exceptions, as where, in the course of business, it has been the custom of the secretary to make such endorsements with the knowledge of the corporation, and in one case it has been held that the secretary of a corporation will be presumed to have authority to endorse a corporate note for transfer. Swedish American National Bank of Minneapolis, v. Koehnrich, 136 Wis. 475.

It does not here appear from the facts set up in the affidavits that the affiants had knowledge as to the extent of the authority of the secretary of the payee corporation in regard to making such endorsements. They do not say that they had knowledge of the manner in which the business of that corporation was conducted. If, in fact, the secretary of the corporation had made an unauthorized endorsement, it would seem as if it should have been possible to secure the affidavit of some official of that corporation, having knowledge thereof, to such fact.

It is true that where affidavits in support of a motion of this sort show a prima facie defense at law to the plaintiff's

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action, the court will usually, in the exercise of sound discretion, permit the defense set up to be interposed. Nevertheless, the supporting affidavits should disclose a clear and equitable reason for opening up the judgment. Sevier v. Horn, 180 Ill. App. 547; Tyler v. Ross, 215 Ill. App. 502. The affidavits here submitted do not meet the requirements of that rule, and the order of the trial court will therefore be affirmed.

AFFIRMED.

McSurely, P.J., and Dever, J., concur.





218 - 27694

CHARLES LORD and HARRY LORD,  
copartners doing business  
under the names of John Lord's  
Sons and Acme Waste Company,  
respectively,

Appellees,

vs.

FIRST NATIONAL BANK OF ENGLEWOOD,  
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

229 I.A. 63

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant bank from a judgment for \$1,568.21 entered on a directed verdict at the close of all the evidence.

The action brought was in tort for the alleged conversion by defendant of certain checks drawn by the makers thereof to the order of plaintiffs doing business under the names of "John Lord's Sons" and "Acme Waste Company." The claim of plaintiffs was based upon the fact that certain checks to their order given in payment for goods sold by them through their Chicago office, were, without authority so to do, endorsed by one W. J. Riddle and deposited with the defendant bank, which collected the proceeds of the checks and credited the same to Riddle's account.

Similar transactions involving similar endorsements made by Riddle were considered by this court in Gustin-Bacon Mfg. Co. v. First National Bank of Englewood, 224 Ill. App. 457, in which case a judgment against the defendant was affirmed. The Supreme Court granted a certiorari and upon consideration affirmed the judgment. Gustin-Bacon Mfg. Co. v. First National Bank of Englewood, 306 Ill. 179. The undisputed evidence here,



as there, is to the effect that Riddle had no authority to endorse these checks. In that case, as here, the defendant contended that the fact that Riddle at a prior time had been a member of a co-partnership consisting of himself and one Rivet, which did business under the name of John Lord's Sons and which represented the Philadelphia copartnership as agents in Chicago and contiguous territory, was material in the case. That copartnership, however, had ceased to act for John Lord's Sons prior to the transactions out of which these controversies arose and the fact that the copartnership of Riddle and Rivet had done business under that name was held wholly immaterial to issues in that case as it is immaterial in this case.

The uncontradicted evidence for plaintiffs shows that the checks were made payable to the order of plaintiffs, some of them under the name of John Lord's Sons and others under the name of the Rome Waste Company; that Riddle, without authority, endorsed the names of the payees upon these checks and deposited them in the defendant bank, which added its own endorsement and collected the proceeds, crediting the same to the personal account of Riddle.

That a banking corporation is in such case liable to the payee in an action of trover for the conversion of the checks is well settled in Rauch v. Ft. Dearborn Nat. Bank, 233 Ill. 507; Crahe v. Mercantile Trust & Savings Bank, 295 Ill. 575; Bentley, Murray & Co. v. LaSalle St. T. & S. Bank, 197 Ill. App. 322. That the burden of proving the authority to endorse the checks in controversy is in such case upon the bank, and that negligence on the part of the owner is not a defense, is also settled by the authorities. Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151; Merchants Nat. Bank v. Nichols & Shepard Co., 283 Ill. 41; Hamlin's Winard Oil Co. v. U. S.



as there, is in the belief that this is an important  
 evidence in the case. In this case, as before, the defendant  
 found that the fact of a letter from him to the  
 member of the committee, residing at 1100 1st and 1st  
 which the defendant had sent to him, was not  
 mentioned. The defendant's representative on the  
 and defendant's representative, was mentioned in the case. That no  
 defendant's representative, however, had seemed to be the only  
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 and the fact that the defendant of 1100 1st and 1st had been  
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in that case as it is mentioned in this case.  
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Express Co., 265 Ill. 156; Quatin-Bacon Mfg. Co. v. First  
Nat. Bank of Englewood, supra.

The appeal is without merit and the judgment is  
affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

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237 - 27713

THEODORE W. WILSON, Appellee,

vs.

MARY E. McLENNAN, Executrix of  
the Estate of George McLeinn,  
alias George McNeil, Deceased,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

229 I.A. 632<sup>1</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for \$4000 entered upon the verdict of a jury in an action on the case for personal injuries.

The declaration alleged and the proof offered for plaintiff tended to show that plaintiff, at that time a minor fourteen years of age, received certain injuries in an accident which occurred May 18, 1915, on Kinzie street, a public highway extending east and west, near its intersection with LaSalle street, another public highway extending north and south, in the city of Chicago.

The proof for plaintiff further tended to show that he was at that time riding a bicycle in an easterly direction; that at the same time a horse hitched to a wagon and owned and driven by a servant of the defendant, was travelling in the same direction, eastward on Kinzie street; that plaintiff was proceeding upon his bicycle at a distance of some four feet to the south of the wagon and the horse, when the driver suddenly turned the horse, knocking plaintiff off the bicycle and severely injuring his foot and limb.

Appellant argues that the manifest weight of the evidence shows no negligence on the part of the defendant; that there is no evidence tending to show that plaintiff exercised any care for his own safety; that the damages allowed are

[illegible]

THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA, D.C., has affirmed the judgment of the District Court of the District of Columbia, in the case of *United States v. [Name]*, No. [Number].

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.



grossly excessive.

It is further argued - and this is the only error alleged which it will be necessary for us to consider - that the court erred in refusing to admit in evidence an ordinance of the City of Chicago which provides in substance that any vehicle overtaking another vehicle should pass on the left side of the overtaken vehicle. The record shows that when this ordinance was offered in evidence the attorney for plaintiff objected, stating as ground for his objection that there was no evidence on which the ordinance could possibly be based. After some argument, however, attorney for plaintiff stated that it might go in, but afterward objected for the reason stated before, and the court sustained the objection. We think there was evidence in the record which made the ordinance competent.

The plaintiff, testifying in his own behalf, stated:

"When I first saw the wagon before the accident I was about even with the rear end of it and passing it by about five feet south of it when I first saw it. When I first saw the wagon I was about four feet south of it. I intended to pass it. There was a buggy alongside the curbstone. I don't remember any other wagons in the street at the time except the wagon and the buggy. As I started to pass the wagon I rang the bell on my bicycle. When the horse turned I was between the back of the horse and the front wheels."

While it may be true, as the plaintiff alleges, that traffic rules of public thoroughfares, whether based upon the law of the road or upon ordinances or statutes, are not inflexible, nevertheless we think this ordinance should have been allowed to go to the jury for its consideration, and that it was error for the court to exclude it.

For the error indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and Dever, J., concur.

*Journal of Interpersonal Violence* 27(10)

...and the other side of the coin is that the more you know about the world, the more you know about yourself.

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THE UNIVERSITY OF CHICAGO PRESS

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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258 - 27734

JOSEPH HOLLER.  
Appellee.

vs.

DAVID ZORK,  
Appellant.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

229 T A. 222

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for \$1,013 entered upon the finding of the court.

The suit grew out of a contract made between plaintiff and defendant on October 8, 1920, whereby the plaintiff agreed to carve and erect a granite monument with two granite markers on the defendant's family lot in the Mt. Mayriv Cemetery in Chicago. The family name "Zork" was to be lettered on the front and back of the monument and on the markers, and the price agreed upon was \$1,100.

The statement of claim alleges this contract and says that the work was done and the monument erected according to the terms of the contract, and that an account between the parties with reference thereto was stated on April 6, 1921, but that defendant is yet indebted therefor.

The defense set up was that the work and labor were not first class, and the affidavit sets up that in several respects the monument did not conform to the specifications. However, it seems that only one alleged defect is now insisted upon by the defendant. He claims that the letter "O" in the family name is different from the design furnished in that the "O" as shown in the design is round whereas as it appears upon the monument it is square.

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1990s, the use of the term "cognitive" has been declining in the literature on the development of language.

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growth of *A. baumannii* and *A. L. baumannii* in *L. baumannii* is shown in Figure 1.

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There is no doubt that the "Black" movement is a very real and significant force in the lives of the people of the United States. It is a movement that is not only a reflection of the social and economic conditions of the time, but also a reflection of the human spirit's desire for freedom and justice. The "Black" movement is a movement that is not only a reflection of the social and economic conditions of the time, but also a reflection of the human spirit's desire for freedom and justice.

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Find a function  $f$  such that  $f(1) = 1$ ,  $f(2) = 2$ ,  $f(3) = 3$ ,  $f(4) = 4$ ,  $f(5) = 5$ ,  $f(6) = 6$ ,  $f(7) = 7$ ,  $f(8) = 8$ ,  $f(9) = 9$ ,  $f(10) = 10$ ,  $f(11) = 11$ ,  $f(12) = 12$ ,  $f(13) = 13$ ,  $f(14) = 14$ ,  $f(15) = 15$ ,  $f(16) = 16$ ,  $f(17) = 17$ ,  $f(18) = 18$ ,  $f(19) = 19$ ,  $f(20) = 20$ ,  $f(21) = 21$ ,  $f(22) = 22$ ,  $f(23) = 23$ ,  $f(24) = 24$ ,  $f(25) = 25$ ,  $f(26) = 26$ ,  $f(27) = 27$ ,  $f(28) = 28$ ,  $f(29) = 29$ ,  $f(30) = 30$ ,  $f(31) = 31$ ,  $f(32) = 32$ ,  $f(33) = 33$ ,  $f(34) = 34$ ,  $f(35) = 35$ ,  $f(36) = 36$ ,  $f(37) = 37$ ,  $f(38) = 38$ ,  $f(39) = 39$ ,  $f(40) = 40$ ,  $f(41) = 41$ ,  $f(42) = 42$ ,  $f(43) = 43$ ,  $f(44) = 44$ ,  $f(45) = 45$ ,  $f(46) = 46$ ,  $f(47) = 47$ ,  $f(48) = 48$ ,  $f(49) = 49$ ,  $f(50) = 50$ ,  $f(51) = 51$ ,  $f(52) = 52$ ,  $f(53) = 53$ ,  $f(54) = 54$ ,  $f(55) = 55$ ,  $f(56) = 56$ ,  $f(57) = 57$ ,  $f(58) = 58$ ,  $f(59) = 59$ ,  $f(60) = 60$ ,  $f(61) = 61$ ,  $f(62) = 62$ ,  $f(63) = 63$ ,  $f(64) = 64$ ,  $f(65) = 65$ ,  $f(66) = 66$ ,  $f(67) = 67$ ,  $f(68) = 68$ ,  $f(69) = 69$ ,  $f(70) = 70$ ,  $f(71) = 71$ ,  $f(72) = 72$ ,  $f(73) = 73$ ,  $f(74) = 74$ ,  $f(75) = 75$ ,  $f(76) = 76$ ,  $f(77) = 77$ ,  $f(78) = 78$ ,  $f(79) = 79$ ,  $f(80) = 80$ ,  $f(81) = 81$ ,  $f(82) = 82$ ,  $f(83) = 83$ ,  $f(84) = 84$ ,  $f(85) = 85$ ,  $f(86) = 86$ ,  $f(87) = 87$ ,  $f(88) = 88$ ,  $f(89) = 89$ ,  $f(90) = 90$ ,  $f(91) = 91$ ,  $f(92) = 92$ ,  $f(93) = 93$ ,  $f(94) = 94$ ,  $f(95) = 95$ ,  $f(96) = 96$ ,  $f(97) = 97$ ,  $f(98) = 98$ ,  $f(99) = 99$ ,  $f(100) = 100$ .

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2000-2001, 2001-2002, 2002-2003



The court refused to hold, as requested by the defendant, that plaintiff did not carve the name "ZORK" on the monument in accordance with the specifications. We have examined the evidence and think that the court was justified in refusing to so find and justified in finding against the defendant and entering judgment in favor of the plaintiff. As a matter of fact, the evidence tends to show that defendant had the opportunity to correct the lettering before the same was cut in the stone but that he did not do so. His complaint was made only when he was urgently requested to pay.

It is argued that as the contract was one involving personal taste, it should have been strictly carried out and in such a manner as to satisfy the purchaser. Two cases, Carpenter v. Chemical Co., 98 Va. 177 and Pennington v. Howland, 21 N. H. 65, are cited. Even if we should hold that the law as expressed in these cases is the law of this state, we should not regard the rule announced as applicable to the facts which appear here.

The judgment will therefore be affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.



267 - 27743

WILLIAM H. COLVIN, doing  
business as WM. H. COLVIN  
& CO.,

Appellant,

vs.

J. N. FULTON, also known as  
JAMES H. SACRENT,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

233 I.A. 632<sup>3</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered in favor of the defendant upon a finding of the court.

The plaintiff's statement of claim alleged an indebtedness of defendant to plaintiff in the sum of \$2,109.66, and interest from July 15, 1919; that in the month of July of that year defendant requested plaintiff to procure a quotation on Middle States Oil Co. stock, then listed on the market; that upon receipt of said quotation, defendant requested plaintiff to sell 1,000 shares of said stock, which plaintiff did. The plaintiff called upon the defendant for said stock in order that he might deliver the same to the purchaser, whereupon defendant turned over to plaintiff's employe 1,000 shares of Middle States Oil Co. stock and received \$2,109.66, being the sale price realized for the listed stock so sold by the defendant. The certificate for the stock was forwarded to New York for transfer, where it was discovered that the stock so delivered by defendant was shares of the Middle States Oil Co. of Arizona, and not shares of the Middle States Oil Co. which were listed on the market and sold by the plaintiff; that as a matter of fact the stock delivered by the defendant was of no value whatever. The plaintiff had requested the defendant to repay the money received, which he had promised to do, but had failed and neg-





lected to fulfill his promise.

The affidavit of merits by defendant was a general denial that he was indebted to plaintiff on an account stated, or that he had been a party to the transaction as alleged in the statement of claim, and that if plaintiff had any such transaction it was with some other person, firm or corporation.

The evidence for the plaintiff tended to show that he was at the time in question a stock broker owning memberships on the New York Stock Exchange, the Chicago Stock Exchange and the New York curb market; that he was a member of the Board of Trade and also of the New York Coffee Exchange; that about July 15, 1919, the defendant called the office of plaintiff over the telephone and asked for a quotation on Middle States Oil Co. stock; that a clerk of plaintiff's told him he would wire New York for a quotation, which he did, and when the quotation came back he telephoned defendant that the market was two and one-eighth dollars a share. Defendant then told him to sell 1,000 shares. Plaintiff thereupon sold the stock and telephoned that fact to the defendant, who said that he was leaving town and wished to know if he could get his check, and plaintiff's clerk replied that if he delivered the certificate he might. About twenty minutes later defendant appeared with the supposed certificate and said that he would guarantee the legality of the transfer of the stock. Mr. Nystrom, with whom defendant dealt, then told the cashier to issue a check to him, which the cashier did, and turned over to defendant this check for the sum of \$2,137.60.

The only Middle States Oil Co. stock at that time listed on the exchange was the Middle States Oil Co. of Delaware. It turned out that the certificate delivered was for stock of the Middle States Oil Co. of Arizona, a concern which had been out of existence for a number of years and the stock of which



was valueless. When the matter was taken up with defendant about ten days later, he stated that he had purchased the certificate from some bank in Texas; that he had brought suit there and that he would make restitution for the amount involved. The evidence also showed that he had never done this.

The defendant has not appeared in this court and we are not therefore informed as to his theory of defense nor as to the reason which induced the trial court to make a finding for the defendant.

It appears that the check given in payment for the stock on July 15, 1919, was made out to the order of the International Finance & Security Company; that this was an Illinois corporation with a capital stock of \$5,000, \$4,600 of which was subscribed for by the defendant and \$400 by four other individuals; that the authority to open books of subscription for its capital stock issued from the office of the Secretary of State on May 26, 1919, and that its charter was filed for record in the recorder's office of Cook County on July 16, 1919, the day following this transaction. It may possibly have been the theory of the court that because the check was made out to the order of this corporation, that the corporation and not the defendant personally would be liable. If so, we do not agree with that theory. We think a preponderance of the evidence indicates that the transaction was with defendant and for his benefit; that the check was given at defendant's request under a mistake of fact, which renders him liable to pay to plaintiff the amount of money received on the check.

The evidence shows that defendant was a director of the International Finance & Security Company. Under the provisions of section 18 of the Corporation Act, under which the company was organized, (See Hurd's Revised Statutes of 1917, chapter 32) he was liable personally, having assumed to exercise



was withdrawn. When the matter was taken up with Wolcott about  
 ten days later, he stated that he had purchased the certificate  
 from some bank in Texas; that he had received only thirty and that  
 he could have possession for the amount involved. The witness  
 also stated that he had never seen it.

The witness has not appeared in this court and he  
 did not produce evidence as to the amount of interest due on  
 the note when introduced the trial court he made a finding  
 for the defendant.

It appears that the check given in payment for the  
 stock on July 18, 1917, was cashed on the night of the same  
 national bank. A receipt was given for this sum in Illinois  
 corporation of the capital stock of \$1,000,000, which was  
 subscribed for by the defendant and paid by that stockholder;  
 that the receipt is upon record of the corporation for the stock  
 stock issued upon the order of the Secretary of State on May 18,  
 1918, and that the receipt was filed for record in the Secretary's  
 office at Rock County on June 20, 1918, and the following day  
 recorded. It was further found that the amount of the stock  
 that became the stock was made out in the name of the corporation,  
 that the corporation was not a limited partnership and that  
 Illinois. It was also found that the company was a  
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 filed in the office of the Secretary of State on June 20, 1918.

The witness stated that the receipt was a receipt of  
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corporate powers without complying with the provisions of that act.

For the reasons indicated, the judgment will be reversed with findings of fact and judgment for the plaintiff here for the amount of the check with interest at 5% from July 15, 1919. Reversed with findings of fact and judgment here.

REVERSED WITH FINDINGS OF FACT.

McSurely, P. J., and Dever, J., concur.

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FINDINGS OF FACT.

We find the facts to be that on July 15, 1919, the appellee, James M. Fulton, delivered to the plaintiff, William H. Colvin, doing business as Wm. H. Colvin & Co., a certain certificate of stock which was supposed to be a certificate in the Middle States Oil Co. of Delaware, and to be of a value of \$2,109.60; that as a matter of fact said certificate delivered represented stock in the Middle States Oil Co. of Arizona, a corporation which was out of business and the stock of which was valueless; that plaintiff at that time delivered to the defendant a check to the order of the International Finance & Security Company, a corporation organized under the laws of Illinois, for the amount of the supposed value of the stock, which check was paid; that said transaction was in fact between the plaintiff and defendant; that upon discovery of the mistake as to the character of the stock, plaintiff demanded the repayment of said sum of \$2,109.60, which defendant several times agreed to repay but afterwards failed to do so; that plaintiff appellant, William H. Colvin, is entitled to recover of and from the defendant appellee, James M. Fulton, also known as James M. Secrest, the said sum of \$2,109.60 with interest thereon at the rate of 5 per cent per annum from the 15th day of July, 1919, to this date, making a total sum of \$2,488.74, for which judgment should be entered.





270 - 27746

BENJAMIN I. SALLINGER,  
Appellant,

vs.

RAND McNALLY & COMPANY, a  
Corporation, WAYNARD MERRILL  
& CO., a Corporation, and D. C.  
HEATH & CO., a Corporation,  
Appellees.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

229 I. 522<sup>7</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff in the trial court from a judgment entered against him for costs. The case was tried by the court without a jury. Neither findings of fact nor propositions of law were submitted to the court. The claim of the plaintiff is stated to be on a quantum meruit for services as an attorney at law rendered to the defendants, for which he demands the sum of \$10,000, \$2,500 of which amount is alleged to be due as a retainer and the remainder as the worth of legal services performed. The declaration was the common counts. In response to a rule to file a bill of particulars, plaintiff set up a supposed claim on a written contract and demands on account of services as an attorney, rendered in certain so-called local suits in the State of Iowa. These demands have, however, been abandoned. There was a stipulation between the parties under which it was agreed that the pleadings might be disregarded by either party, a practice not at all conducive to clearness of issues or brevity of record.

However, it appears that the defendants rely on pleas of non-assumpsit and of the statute of limitations. They also contend that if it be considered that services were in fact rendered, as claimed, the same were wholly without value.

Two controlling questions appear on the record.

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is true of the United States, Canada, and the United Kingdom. The second is the fact that the majority of the population of the United States is of European descent. This is true of the United States, Canada, and the United Kingdom. The third is the fact that the majority of the population of the United States is of European descent. This is true of the United States, Canada, and the United Kingdom.

First, whether as a matter of fact there was a joint employment by the three defendants; and, second, whether, assuming such employment existed, the right of action is barred by the statute of limitations.

Plaintiff is a prominent attorney practicing his profession in the state of Iowa. The defendants were engaged in the business of publishing school books which they desired to have adopted by the authorities of the different municipalities of that state for use in its public schools. The American Book Company was a large publisher of school books designed for similar use, and competed with the defendants for the Iowa business. It was alleged that in the course of such competition the American Book Company endeavored to induce the various local school boards to breach contracts theretofore entered into with the several companies which are defendants here.

Plaintiff in the year 1903 was employed by Maynard Merrill & Co., one of these defendants, in connection with litigation then pending in Iowa and growing out of these alleged practices. The defendant Maynard Merrill & Co. asked plaintiff for a written opinion as to the best plan for securing its legal rights and preventing these supposed wrongs. Plaintiff rendered an opinion under date of December 14, 1903, and in substance recommended that a suit be brought against the American Book Company in the Federal court, praying an injunction against these alleged practices.

As its school book business was limited, Maynard Merrill & Co. suggested to plaintiff that he make a trip to its offices in New York to see and that several publishers similarly situated might be induced to join in the undertaking of bringing such a suit, in order that the expenses of such company might be lessened. Plaintiff made this trip to New York in February, 1904. He afterwards presented his bills for the expenses of this trip

These, together with a number of other things, are the result of the  
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and for the opinion rendered, all of which have been paid in full.

At the meeting held in New York Mr. Merrill was present for the Maynard Merrill Company, Mr. Pulsifer for the defendant D. C. Heath & Co., the defendant Rand McNally & Company not being represented at that meeting. A third firm, Silver Burdette & Co., which is not a defendant here, was represented. The evidence shows that Mr. Merrill stated at that meeting that he wished a written contract; that he did not have enough interest in the matter to go into it in an unlimited way and that he did not wish to go in at all unless at least two others would join in the enterprise. Mr. Silver of Silver Burdette & Co. having decided to stay out, it was agreed that Heath and Merrill would try to get Rand McNally & Co. to join in the matter. Mr. Pulsifer testifies, and is not contradicted, that Mr. Merrill at that time asked plaintiff: "That, in your judgment, would be the cost, the total cost, of such a suit, including lawyers' fees, court fees and expenses. What do you think would be the maximum cost?" Judge Malinger replied, "\$5,000." Mr. Merrill then said, "That means all of the costs in such a suit?" "It does." "And would you undertake it for that price?" "I would." "There shall be no further charges for anything over and above the \$5,000." He said, "Yes." Mr. Pulsifer further testifies in substance that he said he wanted a contract in writing setting that out, and that it was agreed that the further carrying out of the plan should be conditioned upon getting Rand McNally & Co. to join in the prosecution of the Federal suit.

On March 19th thereafter Maynard Merrill & Co. wrote the plaintiff as follows:

"After a conference with the other publishers whose business interests have suffered by reason of the unlawful acts of the American Book Company, and upon your assurance that the cost of



prosecuting the action to a finish will not exceed five thousand (\$5,000) dollars, Messrs. D. C. Heath & Co., Rand, McNally & Co. and ourselves have decided to authorize you to proceed at once to secure an injunction restraining the American Book Co. from unlawful interference with our business."

The letter further stated that it was the understanding of the latter that the expense involved would be divided equally among the different houses authorizing the suit; that there might be some expenses peculiar to individual cases which should be charged to individual houses, and that any arrangement which the plaintiff and the other publishers considered fair and equitable would be entirely satisfactory. Plaintiff acknowledged receipt of this letter on March 30, 1904, stating that he would "soon write you fully about it."

June 20, 1904, Waynard Merrill & Co. again wrote plaintiff, calling his attention to the fact that they had written him on March 19th, that he had acknowledged receipt of the letter, but that they had not had the pleasure of receiving his reply as promised. June 26th plaintiff replied that he had been in direct touch with Rand, McNally & Co. and D. C. Heath & Co., and that both had agreed to join in the fight and bear their proportionate share of the cost, but he had not had their agreement put in writing; that the writing would come to Waynard Merrill & Co. after the other defendants had signed; that when he had arranged definitely with these two firms he would arrange to meet Mr. Merrill; that he hoped to have the matter in shape to present to the proper court on or before October 1, 1904.

Thereafter plaintiff arranged an appointment with defendants Rand McNally & Co. and D. C. Heath & Co. at Chicago on July 2nd, and D. C. Heath & Co. signed a contract by the terms of which plaintiff was employed to conduct the suit, but which placed no limit whatever on the fee that he might charge. Rand McN







Co., however, refused to sign this agreement. July 11th the plaintiff submitted another contract, which was signed by both Rand McKally & Co. and D. C. Heath & Co., and which provided that his fee for conducting the litigation should not be less than \$5,000 and not more than \$10,000. This contract Maynard Merrill & Co. afterward refused to sign for the reason, as they claimed, that it was not in accordance with the agreement made in New York.

Plaintiff in the following year endeavored to get Maynard Merrill & Co. to reconsider and sign this contract, offering to make a collateral agreement that its share of the expense should not be more than one-third of the \$5,000. This Maynard Merrill & Co. refused to do.

Defendants admit that between March 19, 1904, and July of the same year, defendants Maynard Merrill & Co. and D. C. Heath & Co. wrote the plaintiff some six times regarding proposed evidence to be used in the Federal suit. They say that this was done under the impression that plaintiff had accepted <sup>proposition</sup> the ~~XXXXXX~~ of March 19th. They say that plaintiff probably did no work whatsoever in response to these letters, but that, whether he did or not, he was never employed.

The refusal of Maynard, Merrill & Co. to sign the contract, to which the other defendants had already acceded, was discussed at a conference held at its office in New York City on September 26, 1905. At that time Mr. Merrill told plaintiff that not having heard further from him or from the other parties, he had considered the matter at an end. The plaintiff said that this was not his understanding; that he had during the year past been collecting evidence which he thought would be helpful in connection with the proposed suit, and asked whether it was their wish now if he should prosecute the suit. Mr. Merrill told him that he could



not answer this question without giving it careful consideration, and not until the return of the treasurer of the company. The plaintiff said to that, that while he recognized the right to give up their prosecution of the suit, he felt that he was entitled to reasonable compensation for the services which he had already performed in that connection. Mr. Merrill promised at this conference to write plaintiff, which he thereafter did on December 13, 1905, informing plaintiff that he had consulted with the other two defendants and learned that they also had understood that the whole matter had been dropped by mutual consent; recited the letter of March 19, 1904; stated that several months afterward they had received from Chicago copies of a conditional contract, which they had refused to execute because not in accordance with the agreement made; that they had from time to time been sending checks for their share of the expense in the local suits, and further stated: "We understand that one of these cases is now in the Court of Appeals and will be heard in January next, and that a decision in that case will determine whether our Iowa grievances against the A. B. Co. furnish us any adequate material for the prosecution of the 'major suit.' We had relied mainly on the Iowa material for a sufficient cause of action. We understand that Messrs. Rand, McNally & Co. and Messrs. D. C. Smith & Co. agree with us in thinking that it would be unwise to carry the matter further if the decision of the Iowa Court of Appeals is adverse to our contention, and it is the wish of all three houses that no expense should be incurred in the matter until that case is decided. We have endeavored to report faithfully what we understand to be the view of the other houses, but it might be well for you to communicate directly with them in regard to the matter."

To this letter the plaintiff replied December 19,







1905, as follows:

"I admit that you are not bound to sign the written contract which the other firms have signed, and that if you aren't, there is no written contract.

"I grant you the right to direct that, until the McNees case is decided, no further expense shall be incurred in the injunction suit.

"But when all this is said, there remains the fact that I was retained in the injunction suit, worked in it, gave directions in it, and acted upon material furnished me by the representatives of the three firms.

"Fairly construed, your meaning is, that you do not wish to enter into a written contract and that you may abandon the injunction suit if the McNees decision should prove adverse. If I am right in this interpretation, kindly advise me what adjustment you propose on the unwritten contract which this letter has already described."

To this Maynard Merrill & Co. replied on December 22, 1905, that the other houses would speak for themselves with more authority and that they were glad that plaintiff was to communicate directly with them; that they had been under the impression, perhaps without sufficient grounds, that plaintiff had been paid in full to date, but that they had no doubt but what defendants would agree in wishing to have any compensation due or coming due promptly paid. The letter stated: "Our own idea has been to let the matter rest until we get a decision in the case soon to be heard. We should be glad to learn your wishes in the matter."

December 26th plaintiff replied that he had no objection to letting the main question rest until a decision was obtained in the case before the Iowa Supreme court, but that he did object to the position that the case had been mutually abandoned and that the failure to execute the contract had ended the whole matter. He stated: "My position was and is that said suit was not abandoned, and that whether a written contract was signed or not, you owed what was reasonable for a retainer and the work done in the case."

January 18, 1907, the McNees case was decided by the

1. The first part of the report is a general introduction to the project, which includes a statement of the problem, the objectives of the study, and a brief description of the methodology used.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED  
DATE 08-01-2001 BY 60322 UCBAW

1. I have been very busy since I left the office. I have been very busy since I left the office. I have been very busy since I left the office.

and although the war left him physically disabled, a small yard of  
courageous spirit made him a national hero, and he died a hero.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Let  $\alpha$  and  $\beta$  range from 0 to 1, and let  $\gamma$  range from 0 to 1.

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...and the other two are the same as the first two.

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Supreme Court of Iowa and adversely to the contention of the defendants. The Iowa court in substance held that the original contracts of adoption had not been legally made, and that, as the contracts had no existence, the parties to them were not entitled to any relief.

After this decision D. C. Heath & Co. wrote the plaintiff stating that they had received a transcript of the decision of the Supreme Court of Iowa; that they supposed plaintiff had examined it carefully and would be interested to know what he thought of it and hoped he would find it convenient to make a report on the case at an early date. Plaintiff replied February 11, 1907, stating that the effect of the decision was to make every adoption ever had in the state invalid; that it hit the A. B. Co. harder than anyone else; that it would have no effect on the general suit except to remove things done in the State of Iowa from the list of acts on account of which an injunction might be obtained. He gave his opinion that it would be of no use to apply for a rehearing; that if wished, he would have a statement of the costs in the District and Supreme courts made out and forwarded.

February 12, 1907, D. C. Heath & Co. replied that plaintiff's opinion coincided in general with the opinions of others who had examined the decision; stated that in June, 1906, a check had been sent to plaintiff for \$500 to cover the \$200 which plaintiff had advanced for costs and \$300 on fee account; that the writer's impression was that the \$200 was expected to approximately cover the costs in the case up to the decision of the Supreme court.

Plaintiff again wrote Maynard Merrill & Co. on September 12, 1907, asking them to refer to their letter to him of December 13, 1906, his of December 19th, theirs of December 29th, and also his of December 28th of the same year. He asked them to

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

The first of these is the fact that the
 Commission has not yet received any
 information from the Government of
 the United States regarding the
 activities of the Committee. It is
 therefore necessary for the
 Commission to request the
 Government to provide the
 information requested.

TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES:



make an examination of the correspondence referred to and advise him of their further pleasure. Maynard Merrill & Co. replied on September 17, 1907, stating that after looking over the correspondence referred to they did not see that they needed to add anything to what had already been written; called plaintiff's attention to his statement that he would take the matter up with the Chicago houses and communicate with them again after the McNeese case was tried; stated that as they had no letters from plaintiff since that date they were without information as to the result of his correspondence with the Chicago houses, but would send them a copy of his letter. The plaintiff did not reply to this letter until September 4, 1909, when he again wrote Maynard Merrill & Co. asking for an immediate answer to his letter of September 12, 1907, and stating that "some adjustment of matters between us must come to pass very soon." Maynard Merrill & Co. replied September 7, 1909, enclosing a copy of their letter of September 17, 1907, and stating, "We really do not see what more we can say."

December 20th following plaintiff again wrote, calling attention to the correspondence which he said clearly showed that the adjustment of what was due him was to await the decision of the McNeese case, and that after that case was decided he was to be paid, and it was <sup>to be</sup> ~~was~~ decided what further work was to be done. He stated, "I am constrained to say to you that you must find a way to see how you can say more than this. You have a perfect right to discontinue the litigation in which you retained me, but you can not pay your bills by writing such letters as you have written." Plaintiff requested that someone authorized to speak for the three defendants should meet him at Des Moines, there to determine, first, whether any further work should be done; and, second, the amount that was due him. He stated that if an ad-



justment was not seen had he would bring suit.

Charles W. Merrill Co., successor to Waynard Merrill & Co., replied that if plaintiff felt that he had a claim against them and the other houses, would he please submit it, making it as specific as possible; that they would endeavor in the near future to have a conference with the other defendants and would advise him of the result. Plaintiff replied December 26, 1909:

"You do know that you employed me, that this involves a retainer fee and that I did work until you stopped me to await the decision of the McNeen case. You know you offered me \$5000 on contract for the work. You also know that the other two houses signed an agreement to pay me \$10,000. This surely gives you some basis for conferring with the others and then arranging a meeting to settle details.

"I will wait a reasonable time on your conference with the others and upon advising me of the result. But I must hear something definite by or before February first, 1910, or I shall be compelled to bring suit as I wrote before."

January 5, 1910, Merrill & Co. replied that they had always met their obligations fully and promptly; that they had supposed that plaintiff had been paid in full for all services rendered; that they had written plaintiff, asking him to submit his claim, making it as specific as possible, and regretted that he had not done so, adding, "When you do we will give it prompt and careful attention."

January 20, 1910, plaintiff replied: "I judge from your last letter that we may consider letter writing closed. I regret to say that you leave me no alternative other than commencing suit, which I shall do."

Merrill & Co. again wrote on January 25, 1910, stating that they had supposed that plaintiff had been paid in full; that they had nevertheless more than once expressed their willingness to give prompt and careful attention to any claim which he might have to offer, but that if plaintiff thought the best way to effect a settlement of this claim was to commence suit, they would, while regretting his action, "cheerfully accept the situation."







October 21, 1910, plaintiff wrote Rand McNally & Co., stating his position with regard to his claim; that he had made a number of attempts at a peaceable adjustment with Merrill & Co.; that the correspondence enclosed would show just what had taken place; that he did not wish to resort to suit without advising them of the situation; that he was still willing to go into conference in the matter and would be glad to be advised at their earliest convenience. On the same day he wrote a similar letter to the other defendant, D. C. Heath & Co., who replied that they understood that Mr. Merrill had asked plaintiff if he had a claim against the defendants to file an itemized bill. They said: "You talk of a contract, of services, etc., but you give us no bill of particulars." They stated that so far as they were concerned they would stand by the agreement of July 11, 1904, which was conditional that the three houses should sign the contract, but which, as Waynard Merrill & Co. had not signed, was in no sense operative.

We have recited the history of the case at some length. We have not recited the facts with reference to the supposed value of the services which the plaintiff claims he rendered. The finding of the court is that plaintiff is not entitled to anything. We assume that if services were rendered the same must have been of some value.

It is apparent from the evidence as recited, as the plaintiff now concedes, that there was no express contract for his services. We also assume the court properly found that the contracts which were submitted by plaintiff to Waynard Merrill & Co. were not in accordance with the agreement made at the prior conference in New York, nor in conformity with the conditions expressed in the letter of Waynard Merrill & Co. dated March 19, 1904.



If the plaintiff has any right of action it must be on account of services rendered by him at the request of defendants on account of which the law would imply a promise to pay a reasonable sum. As his suit is against three defendants, it is apparent that if he is to recover it must be upon evidence of a joint employment. We think his evidence fails to show such joint employment. Appellees state that the record is barren of any evidence of a request by Rand McNally & Co. that plaintiff should do any work upon the Federal suit, or of anything that could be construed into a request for his services in that regard. There is not a letter in this voluminous record which in any way indicates a request on their part that plaintiff should render any services in the suit, - either by Rand McNally & Co. nor by anyone authorized to act in their behalf. Plaintiff having elected to bring suit against the several defendants jointly in this form of action, must have judgment against all defendants or none. It would have been error to enter a judgment against one defendant only. Teich v. Ayer, 213 Ill. App. 41; Tolman v. Spaulding, 3 Scam. 13.

But, even if we were to assume the existence of a joint liability from defendants to the plaintiff by reason of an implied contract, we think the same would be barred by the Statute of Limitations. The original suit was begun on April 15, 1911, and any services rendered by the plaintiff more than five years prior to that date would be barred by the statute. Plaintiff's contention seems to be that the statute is not applicable because, as he says, the work which he did was not completed within the five year period. Plaintiff cites as authority Wright v. Wilson, 45 N. Y. 306, to the effect that where there is a contract of employment by which an attorney is to conduct a suit until its

It was inevitable that the people of the world should be divided into two camps, the one of which is the camp of the future, and the other of which is the camp of the past. The people of the future are the people of the world, and the people of the past are the people of the world. The people of the future are the people of the world, and the people of the past are the people of the world.

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termination, the statute does not begin to run against a suit to collect compensation until the termination of the employment. The law as there laid down is not disputed, and the same rule is well established in the courts of Illinois. Walker v. Goodrich, 10 Ill. 341; Meyer v. McCusker, 75 Ill. App. 119; Quackebush v. Tilling, 167 Ill. App. 5. But we do not regard these cases as applicable to the situation which appears here. There was no agreement here on the part of the attorney to conduct the litigation until its termination. On the contrary the plaintiff now concedes that the contracts submitted by him looking to that end were never in fact executed. Defendants, if liable at all, are liable only on an implied promise to pay for services actually rendered at their request. In such a case it seems too clear to be disputed that the Statute of Limitations would begin to run from the date upon which said services were rendered.

We do not see how, under the evidence, plaintiff can claim a request for any such services after the conference in New York; nor, we might add, do we see in the record the necessity for such services in connection with this so-called Federal suit. It may be that two of these defendants were severally liable to some extent for services requested. On this point it is not necessary that we should make any decision, but assuming a joint request from the three defendants for services in that regard and an implied promise to pay for such services when rendered, we think the record conclusively establishes that by failure to bring his action within five years, plaintiff is now barred by the Statute of Limitations.

The judgment is affirmed.

**AFFIRMED.**

McSurely, P. J., and Dever, J., concur.



318 - 27794

POWER PLANT SPECIALTY COMPANY,  
a corporation,

Appellee,

vs.

T. C. WARDEN,

Appellant.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

229 I.A. 632

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$4,975 entered upon the verdict of a jury after motion for a new trial and in arrest of judgment had been overruled.

The statement of claim alleged, and the proof tended to show, that pursuant to the terms of a written contract entered into between the plaintiff and defendant on June 13, 1913, the plaintiff installed in the Waukena Hotel at Fort Dodge, Iowa, of which defendant was the owner, a certain water heating, softening and filtering device or system known as "The Vater Constant Temperature Feed Water Heating Softening and Filtering System;" that the price agreed to be paid for such system upon its installation, according to the terms of the contract, was \$4,975, of which sum one-half was to be paid in cash upon the arrival of the machinery at Fort Dodge, Iowa, and the balance in sixty days hereafter. It further appears from the pleadings in evidence, that after the installation of this system the defendant herein refused to pay for the same, alleging that it did not meet warranties implied and expressed in the contract and notified the plaintiff to remove the same, which plaintiff refused to do, and thereupon the machinery was removed from the hotel and stored, and plaintiff notified.





The instructions given by the court to the jury, of which no complaint is made by either party, indicate that the case was tried upon the theory that sub-section 1 of section 15, chap. 131a, Cahill's Ill. Revised Statutes 1921, p. 3038, being a part of the Uniform Sales Act, was applicable. This sub-section provides:

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies upon the seller's skill or judgment, (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose."

The uncontradicted evidence showed that prior to the purchase of this system, the plaintiff's president visited and examined the hotel of defendant at Fort Dodge, Iowa, and made a written report of his inspection to the defendant, in which report he advised defendant that it would not pay to put in a system for the purpose of softening the cold water at the hotel, but that plaintiff's system was the very thing that defendant needed for the purpose of softening the hot water, and that it would prove to be a paying proposition if taken on this basis.

The issues of fact as raised by the pleadings were submitted to the jury. The appellant argues that the verdict of the jury is against the evidence and that a new trial should have been granted for that reason. However, as the judgment must be reversed for a reason which we are about to state, and the case will probably be tried again, we shall not express any opinion upon the weight of the evidence.

It is urged by the defendant appellant that the trial court erred in refusing to receive and permit certain evidence offered by the defendant to be submitted to the jury. There was evidence tending to show that from the inspection which the plaintiff's president had made of the hotel at Fort Dodge, and its equipment, that he knew that there was no power plant there,



and that under the system by which the same was heated no exhaust steam would be produced by which the water could be treated. The system installed required, in order that it might be used most effectively, that the water should be heated up to a temperature of 200 degrees F. The amount of water which under the system was to be so treated, was 2000 gallons per hour, and the defendant offered to show by a competent witness that in the absence of a plant which would produce exhaust steam, (that is steam which had been already used) in order to heat this quantity of water to 200 degrees F. for one year, would require expenditure of from \$5,000 to \$5,200, and that this cost of operation would be prohibitive.

The court, after hearing counsel at some length, sustained objection to all these questions and stated that it would not allow the defendant to show the cost of operating the plant for any purpose whatever. We think in so ruling the court erred. There was evidence tending to show that the economic cost of operating the softener was one of the matters uppermost in the mind of the defendant at the time he made the purchase; that he relied upon the plaintiff's skill and judgment and that he himself was unacquainted with the system which was to be installed, of with its merits.

The plaintiff argues that in this respect the defendant relied upon his own architect. While there is proof in the record that the written contract was submitted to the architect, the record is entirely devoid of any proof tending to show that the architect gave any opinion in the matter upon which the defendant relied.

The plaintiff further argues that there is no evidence that the water softener as installed placed any greater burden upon defendant's steam plant during the months when it was in operation, and that there was no substantial increase in the



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cost of operating the steam plant by reason of the installation of the system. There is, however, evidence in the record from which the jury might find to the contrary.

We think that the evidence offered was competent and should have been allowed to go to the jury and that it was error to refuse it. For this error the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, F. J., and Dever, J., concur.

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PEOPLE OF THE STATE OF  
ILLINOIS.

Defendant in Error,

vs.

JULIA RECTOR,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

229 T.A. 633<sup>1</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out by Julia Rector, who was the defendant to an information filed which charged that November 18, 1921, at Chicago, and at No. 209 West 35th street, she did "knowingly, wilfully and unlawfully participate in an obscene show and entertainment." She entered a plea of not guilty, and signed a jury waiver. The court heard the evidence, found defendant guilty, and imposed a fine of \$200 and costs. The prosecution was brought under section 234½ of chapter 38 of the Criminal Code which provides:

"That any person who prepares, advertises, gives, presents, or participates in, any obscene, or indecent drama, play, exhibition, show or entertainment, and every person aiding or abetting such act, and every owner or lessee or manager of any theater, moving picture house, garden, building, room, place or structure, who leases or lets the same or permits the same to be used for the purposes of such drama, play, exhibition, show or entertainment, or who assents to the use of the same for any such purpose, shall be guilty of a misdemeanor.  
\* \* \*."

Plaintiff in error is twenty-eight years of age, has for several years been employed as a singer and entertainer at various places in the city where public dances have been conducted. She was, at the time of the alleged offense, employed in that capacity at the Entertainers Cafe, and received a salary of \$30 per week for her services. The principal contention in her behalf is that the court erred in receiving over objection





evidence of transactions and incidents which occurred on dates other than the particular time named in the information. We have examined the record on this point and find that no evidence was admitted as to any improper conduct subsequent to the date of the filing of the information nor evidence of any such conduct without the period of the statute of limitations. The prosecution was for a misdemeanor and in such cases it is not necessary that the time of the offense shall be precisely charged as in felony.

It is again urged that the court erred in admitting, as against the defendant, evidence as to improper conduct engaged in by patrons of the place and in which improper acts plaintiff in error did not directly take part. The evidence, however, tended to show that plaintiff in error in the course of her performances mingled with the patrons of the place in a way which, from a legal standpoint, we think, made her a participant in their illegal and indecent acts, in some of which, we are glad to believe, the evidence indicates she did not directly participate.

The evidence leaves no reasonable doubt of the general character of the place as it was conducted, nor doubt that the defendant must have had knowledge of its character. There is no doubt of this defendant's guilt under the law and the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

evidence of consciousness and intention which occurred on later  
 after than the preceding time taken in the investigation. It  
 was examined the record on this point and find that no evidence  
 was obtained as to any improper conduct subsequent to the date  
 of the filing of the information nor evidence of any such conduct  
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 was for a misstatement and in such cases it is not necessary that  
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 It is again urged that the court erred in admitting  
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 to show that plaintiff in fact, as the cause of his statements  
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 standpoint, we think, was not a statement in which plaintiff and  
 innocent wife, in some of which, we are glad to believe, the  
 evidence indicates the wife was not a participant.  
 The evidence tends to establish that of the conduct  
 character of the place as it was conducted, not being that the  
 defendant was not have his knowledge of the character. There is no  
 doubt of this defendant's belief that the law was not intended  
 is affirmed.

VERY TRULY,  
 YOURS,

Respectfully, J. L. and Mary, J. L. and Mary, J. L. and Mary.

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38 - 27864

GEORGE VOGEL and BIRDIE VOGEL,  
Defendants in Error,

vs.

THE INDEMNITY COMPANY OF AMERICA,  
a Corporation,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

229 I.A. 633<sup>2</sup>

MR. JUSTICE MACHENY DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was the defendant in the trial court, where it was sued on a contract of insurance, by which it agreed to indemnify the plaintiffs against loss by theft of a certain Geo automobile owned by them, the value of which was fixed by the policy at \$1800. The policy contained a provision that the defendant's liability was contingent upon the theft of the automobile by some person or persons not of plaintiffs' household and not in their employment.

The affidavit of denies states that the automobile was stolen by persons unknown to plaintiffs and not of their household; alleges that plaintiffs had not made proof of loss in writing within 60 days, as required by the terms of the policy; and further, that plaintiffs made misrepresentations through which they obtained the policy, which under its terms rendered the policy void.

The case was tried by the court without a jury and there was a finding for the plaintiffs for the full amount claimed and judgment entered on the finding.

Plaintiff in error first argues that the burden was on the plaintiffs to prove not only the loss of the automobile by theft, but that it was stolen by someone not in their employment and not of their household. It is said that the proof on this point is wholly insufficient unless a presumption is based

and the fact that the Government has been unable to obtain any reliable information from the sources mentioned above, it is not possible to make a definite statement as to the results of the investigation.

The following will not be used to complete the

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and the following is a summary of the work of the committee on the subject of the "National Security Council Intelligence Directive No. 1" (NSC-1) which was issued in 1949. The committee was composed of representatives of the State Department, the Defense Department, and the Atomic Energy Commission. The committee's report, "The National Security Council Intelligence Directive No. 1", was issued in 1950. The committee's report was a response to the NSC-1 which was issued in 1949. The committee's report was a response to the NSC-1 which was issued in 1949. The committee's report was a response to the NSC-1 which was issued in 1949.



upon a presumption, which is not permissible. Globe Insurance Co. v. Gerisch, 163 Ill. 635; Condon v. Schoenfeld, 214 Ill. 286.

The evidence for the plaintiffs tended to show that on February 15, 1921, Mrs. Vogel, one of the plaintiffs, drove the automobile in question to a bank with which she did business, situated at the intersection of Roosevelt Road and Related Street; that she locked the car and went into the bank, staying there probably fifteen or twenty minutes; that when she came out the car was gone; that she reported it to an officer standing there, and that he directed her to the Maxwell Street station, where she told the officers that the car had been stolen; that the next morning she called Mr. Bahr, the agent of the defendant, and told him that the car had been stolen.

These and other circumstances related by the witnesses were, we think, sufficient to authorize a finding on this point. Similar evidence given on suits brought upon similar policies has been held sufficient to sustain a finding. Kansas City Rental Auto Co. v. Old Colony Ins. Co., 174 N. W. 155; Chepakoff v. National Ben Franklin Fire Ins. Co., 161 N. Y. Supp. 283; Bird v. St. Paul Fire Marine Ins. Co., 137 N. W. 265. In the last cited case the court said:

"It was not incumbent upon the plaintiff to negative conjectural defenses on the part of the person who took the automobile. It was sufficient for him to offer evidence from which the jury could reasonably infer a theft of the car."

With reference to the contention of plaintiff in error that the proof was insufficient to show that the assured rendered a sworn statement of loss within sixty days of the date of the loss, which was a condition of defendant's liability under the terms of the policy, we find, upon an examination of the testimony, that there was evidence from which the court might properly have found that this condition had been complied with.



Moreover, there was proof tending to show that prior to the expiration of the sixty days the defendant expressly denied all liability under the policy, and we think the effect of such denial was a waiver on its part of proofs of loss. Quash v. Home Ins. Co., 183 Ill. App. 32; St. Onge v. Hartford Fire Ins. Co., 204 Ill. App. 127; Elder v. Insurance Co. of North America, 206 Ill. App. 172.

Plaintiff in error next contends that under the terms of the policy the same was void because the undisputed proof shows that at the time it was issued there was a chattel mortgage of \$556 on the automobile. The insurance policy provided that it should be void in such case. The evidence, however, tended to show that this insurance was purchased by plaintiffs from defendant through defendant's agent, Bahr, who, prior to the issuance of the policy, was informed of the existence of this incumbrance. While the extent of Bahr's agency was disputed as a matter of fact, the court found against defendant on that issue, and we are not disposed to disturb the finding.

It appears from the evidence that Mr. Bahr sold the policy to the plaintiffs and that when it was issued it was delivered through Mr. Bahr; that Bahr collected the premiums and was paid a commission by defendant, while he received no compensation from the plaintiffs. In Phoenix Ins. Co. v. Stocks, 149 Ill. 319, the Supreme Court of this State said:

"It has been repeatedly held by this court, that an agent, although local in respect of the territory in which he operates, who is clothed with general power to solicit and make contracts of insurance for the company, is so far a general agent that notice to him of facts affecting the contract is notice to the company."

See Abrahamson v. Hartford, 181 Ill. App. 254.

However, in this case it appears that the application for insurance was not filled out or signed by plaintiffs



1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy of maintaining the value of the pound at its pre-war level. This has been due to a variety of factors, including the fact that the Government has been unable to secure the necessary foreign exchange to finance its policy.

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

[illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.



but by the agent for the defendant, Bahr & Company. It has been held in numerous cases that under such circumstances a holder of an insurance policy may not successfully be charged with fraud or deception. Andas Ins. Co. v. Fish, 71 Ill. 620; Lycoring Ins. Co. v. Jackson, 83 Ill. 302; Union Ins. Co. v. Chinn, 93 Ill. 96.

Moreover, the defendant has never returned nor offered to return the insurance premium, and by retaining the same with knowledge, must be deemed to have ratified the contract.

McCurry v. Metropolitan Life Ins. Co., 168 Ill. App. 625.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

and is the agent for the Baltimore, John & Company. It has been  
said in some cases that which some circumstances a notice of  
and therefore, they may not necessarily be charged with them  
of themselves. This has been the case in 1911 and 1912  
and in 1913. In 1914, the case was decided in favor of the  
company.

However, the company has never received any of  
the money for the services rendered, and by retaining the same  
with themselves, they are liable to the company.  
The company is entitled to the money.

Very truly,  
Yours,  
J. H. H. H.

Enclosed is a copy of the report of the  
committee on the subject of the  
company's affairs.

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error.

vs.

NAMIE DOLAN,

Plaintiff in Error.

MINOR TO

MUNICIPAL COURT OF  
CHICAGO.

229 I.A. 639

MR. JUSTICE KATCHETT DELIVERED THE OPINION OF THE COURT.

The record in this case shows that plaintiff in error was arraigned under an amended information which charged her with the crime of petty larceny; that she pleaded "not guilty" after motion to quash the same had been overruled; that being duly advised of her rights she signed a jury waiver; that the case was submitted to the court and that the court, after hearing the evidence, found plaintiff in error guilty in manner and form as charged, and that the value of the property stolen was \$5; that motions for a new trial and in arrest of judgment were overruled and judgment entered and plaintiff in error sentenced to pay a fine and serve one year in the house of correction.

The first point argued in behalf of the plaintiff in error is based on the theory that the record fails to show that the amended information was in fact filed. It is true that the abstract fails to so show, but from the record itself it affirmatively appears that the same was filed. This first point can therefore not be sustained.

It is next urged that the evidence fails to show the kinds of money stolen or its value. Plaintiff in error cites People v. Harris, 302 Ill. 590, on this point. Here again it appears, from an examination of the record, that the bills alleged to have been stolen, and which were found in the possession of plaintiff in error, were introduced in evidence

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There is no information in the file as to whether or not the subject was ever interviewed. The file is being maintained by the FBI, and it is not known whether or not the subject was ever interviewed. The file is being maintained by the FBI, and it is not known whether or not the subject was ever interviewed.

and the other two are the same as in the previous case.

10-11-68, 10-12-68, 10-13-68, 10-14-68, 10-15-68, 10-16-68, 10-17-68, 10-18-68, 10-19-68, 10-20-68, 10-21-68, 10-22-68, 10-23-68, 10-24-68, 10-25-68, 10-26-68, 10-27-68, 10-28-68, 10-29-68, 10-30-68, 10-31-68, 11-1-68, 11-2-68, 11-3-68, 11-4-68, 11-5-68, 11-6-68, 11-7-68, 11-8-68, 11-9-68, 11-10-68, 11-11-68, 11-12-68, 11-13-68, 11-14-68, 11-15-68, 11-16-68, 11-17-68, 11-18-68, 11-19-68, 11-20-68, 11-21-68, 11-22-68, 11-23-68, 11-24-68, 11-25-68, 11-26-68, 11-27-68, 11-28-68, 11-29-68, 11-30-68, 12-1-68, 12-2-68, 12-3-68, 12-4-68, 12-5-68, 12-6-68, 12-7-68, 12-8-68, 12-9-68, 12-10-68, 12-11-68, 12-12-68, 12-13-68, 12-14-68, 12-15-68, 12-16-68, 12-17-68, 12-18-68, 12-19-68, 12-20-68, 12-21-68, 12-22-68, 12-23-68, 12-24-68, 12-25-68, 12-26-68, 12-27-68, 12-28-68, 12-29-68, 12-30-68, 12-31-68, 1-1-69, 1-2-69, 1-3-69, 1-4-69, 1-5-69, 1-6-69, 1-7-69, 1-8-69, 1-9-69, 1-10-69, 1-11-69, 1-12-69, 1-13-69, 1-14-69, 1-15-69, 1-16-69, 1-17-69, 1-18-69, 1-19-69, 1-20-69, 1-21-69, 1-22-69, 1-23-69, 1-24-69, 1-25-69, 1-26-69, 1-27-69, 1-28-69, 1-29-69, 1-30-69, 1-31-69, 2-1-69, 2-2-69, 2-3-69, 2-4-69, 2-5-69, 2-6-69, 2-7-69, 2-8-69, 2-9-69, 2-10-69, 2-11-69, 2-12-69, 2-13-69, 2-14-69, 2-15-69, 2-16-69, 2-17-69, 2-18-69, 2-19-69, 2-20-69, 2-21-69, 2-22-69, 2-23-69, 2-24-69, 2-25-69, 2-26-69, 2-27-69, 2-28-69, 2-29-69, 2-30-69, 3-1-69, 3-2-69, 3-3-69, 3-4-69, 3-5-69, 3-6-69, 3-7-69, 3-8-69, 3-9-69, 3-10-69, 3-11-69, 3-12-69, 3-13-69, 3-14-69, 3-15-69, 3-16-69, 3-17-69, 3-18-69, 3-19-69, 3-20-69, 3-21-69, 3-22-69, 3-23-69, 3-24-69, 3-25-69, 3-26-69, 3-27-69, 3-28-69, 3-29-69, 3-30-69, 3-31-69, 4-1-69, 4-2-69, 4-3-69, 4-4-69, 4-5-69, 4-6-69, 4-7-69, 4-8-69, 4-9-69, 4-10-69, 4-11-69, 4-12-69, 4-13-69, 4-14-69, 4-15-69, 4-16-69, 4-17-69, 4-18-69, 4-19-69, 4-20-69, 4-21-69, 4-22-69, 4-23-69, 4-24-69, 4-25-69, 4-26-69, 4-27-69, 4-28-69, 4-29-69, 4-30-69, 5-1-69, 5-2-69, 5-3-69, 5-4-69, 5-5-69, 5-6-69, 5-7-69, 5-8-69, 5-9-69, 5-10-69, 5-11-69, 5-12-69, 5-13-69, 5-14-69, 5-15-69, 5-16-69, 5-17-69, 5-18-69, 5-19-69, 5-20-69, 5-21-69, 5-22-69, 5-23-69, 5-24-69, 5-25-69, 5-26-69, 5-27-69, 5-28-69, 5-29-69, 5-30-69, 5-31-69, 6-1-69, 6-2-69, 6-3-69, 6-4-69, 6-5-69, 6-6-69, 6-7-69, 6-8-69, 6-9-69, 6-10-69, 6-11-69, 6-12-69, 6-13-69, 6-14-69, 6-15-69, 6-16-69, 6-17-69, 6-18-69, 6-19-69, 6-20-69, 6-21-69, 6-22-69, 6-23-69, 6-24-69, 6-25-69, 6-26-69, 6-27-69, 6-28-69, 6-29-69, 6-30-69, 7-1-69, 7-2-69, 7-3-69, 7-4-69, 7-5-69, 7-6-69, 7-7-69, 7-8-69, 7-9-69, 7-10-69, 7-11-69, 7-12-69, 7-13-69, 7-14-69, 7-15-69, 7-16-69, 7-17-69, 7-18-69, 7-19-69, 7-20-69, 7-21-69, 7-22-69, 7-23-69, 7-24-69, 7-25-69, 7-26-69, 7-27-69, 7-28-69, 7-29-69, 7-30-69, 7-31-69, 8-1-69, 8-2-69, 8-3-69, 8-4-69, 8-5-69, 8-6-69, 8-7-69, 8-8-69, 8-9-69, 8-10-69, 8-11-69, 8-12-69, 8-13-69, 8-14-69, 8-15-69, 8-16-69, 8-17-69, 8-18-69, 8-19-69, 8-20-69, 8-21-69, 8-22-69, 8-23-69, 8-24-69, 8-25-69, 8-26-69, 8-27-69, 8-28-69, 8-29-69, 8-30-69, 8-31-69, 9-1-69, 9-2-69, 9-3-69, 9-4-69, 9-5-69, 9-6-69, 9-7-69, 9-8-69, 9-9-69, 9-10-69, 9-11-69, 9-12-69, 9-13-69, 9-14-69, 9-15-69, 9-16-69, 9-17-69, 9-18-69, 9-19-69, 9-20-69, 9-21-69, 9-22-69, 9-23-69, 9-24-69, 9-25-69, 9-26-69, 9-27-69, 9-28-69, 9-29-69, 9-30-69, 10-1-69, 10-2-69, 10-3-69, 10-4-69, 10-5-69, 10-6-69, 10-7-69, 10-8-69, 10-9-69, 10-10-69, 10-11-69, 10-12-69, 10-13-69, 10-14-69, 10-15-69, 10-16-69, 10-17-69, 10-18-69, 10-19-69, 10-20-69, 10-21-69, 10-22-69, 10-23-69, 10-24-69, 10-25-69, 10-26-69, 10-27-69, 10-28-69, 10-29-69, 10-30-69, 10-31-69, 11-1-69, 11-2-69, 11-3-69, 11-4-69, 11-5-69, 11-6-69, 11-7-69, 11-8-69, 11-9-69, 11-10-69, 11-11-69, 11-12-69, 11-13-69, 11-14-69, 11-15-69, 11-16-69, 11-17-69, 11-18-69, 11-19-69, 11-20-69, 11-21-69, 11-22-69, 11-23-69, 11-24-69, 11-25-69, 11-26-69, 11-27-69, 11-28-69, 11-29-69, 11-30-69, 12-1-69, 12-2-69, 12-3-69, 12-4-69, 12-5-69, 12-6-69, 12-7-69, 12-8-69, 12-9-69, 12-10-69, 12-11-69, 12-12-69, 12-13-69, 12-14-69, 12-15-69, 12-16-69, 12-17-69, 12-18-69, 12-19-69, 12-20-69, 12-21-69, 12-22-69, 12-23-69, 12-24-69, 12-25-69, 12-26-69, 12-27-69, 12-28-69, 12-29-69, 12-30-69, 12-31-69, 1-1-7

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and not least some of the new products should meet the

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and the same have not been preserved in the bill of exceptions. We will therefore presume that this evidence would have tended to sustain the finding. People v. Hiehoff, 266 Ill. 108.

It is next urged that the evidence does not disclose that plaintiff in error was guilty without a reasonable doubt. We have carefully examined all the evidence and it leaves no doubt in our minds.

APPROVED.

McSurely, F. J., and Dever, J., concur.

and the same time and been preserved in the bill of exchange,  
 in all instances because that this system would have been  
 in order in the United States, and the bill, 1894

It is now agreed that the evidence does not show  
 that directly in order was being at least a reasonable doubt,  
 to have conclusively shown all the evidence and it is now so

which is not clear

RECEIVED

RECEIVED 11.11.11 and 1894, 1894

127 - 27961

JAMES M. BALDWIN,

Appellee,

vs.

THE YELLOW CAB COMPANY,  
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

229 I.A. 633<sup>4</sup>

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for plaintiff for \$75 in a suit to recover damages to his automobile, resulting from its collision with that of defendant's at a street intersection in Chicago. Plaintiff was driving south on the west side of Dorchester avenue and defendant's cab was being driven east on the south side of 53rd street. Each claimed at the trial that the other was guilty of negligence. The only question before us is whether we can say that the court's finding was manifestly against the evidence, and is to be determined mainly from the testimony of plaintiff and of defendant's chauffeur.

Plaintiff testified that as he came to 53rd street he stopped his car on the north crosswalk; that from that point he looked in both directions; that the buildings came to the corners of the street; that he could see from where he stopped about 150 feet to his right and saw no vehicle approaching; that he proceeded to cross the street after shifting into second speed, and just after he had crossed the center of the street the spring of the cab hit the rim of his right front wheel and fender and carried his car over the curb into the parkway at the southeast corner of the intersection; that just about the

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time of the collision he heard the cab, which had "anti-skid chains" on its wheels, and did not see it before then.

Defendant's chauffeur testified that he came into 53rd street from Kenwood avenue, a block or about 300 feet west of Dorchester; that as he came to Dorchester he was driving about 15 miles an hour, and was right near the crosswalk when he first observed plaintiff's car, which he thought was going about the same speed as his. He said: "I started ahead and kept going. I presumed he was going to stop and when I saw he was not going to stop I threw on my brake and turned to the right. \* \* I hit him in the center of the intersection." Afterwards he said that: "His car hit mine. I put on the brakes and the rear skidded." His car was equipped with "skid chains" on the rear wheels. The street was slippery from ice. Both cars went to the southeast. Without detailing other circumstances tending to support the conclusion we think it apparent that defendant's cab ran into plaintiff's car.

It is also apparent that the chauffeur acted entirely upon the presumption that he had the right of way. He said: "When I came to Dorchester I noticed a car coming out on the crosswalk. I presumed I had the right of way." And again: "When I first saw Mr. Baldwin I was at the crosswalk and was travelling ten or twelve miles per hour. At that time Mr. Baldwin was right back of the north crosswalk on Dorchester." If these statements were true he could have crossed ahead of plaintiff, both going at the same rate of speed, as he testified, for his car had a much lesser distance to go before they reached the point of intersection, which was manifestly on the south side of 53rd street between its center and the south crosswalk. 53rd street is only 43 feet wide. His statement, therefore, as to the relative positions of the cars when they approached the line

view of the relation in power the law, which has been made

known, on the whole, and the law is before them.

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there they would cross each other's path is not as convincing as that of plaintiff's, who testified that he stopped his car or came to first speed before entering upon the crossing and went into second speed as he was crossing, and defendant's car was not then within his vision of 150 feet to his right. accordingly he must have moved across 53rd street more slowly than defendant's car was driven, which was admittedly about 12 miles per hour, and from their relative positions defendant's chauffeur must have seen plaintiff crossing the intersection when he was a considerable distance from it, and, therefore, at a time when in view of their relative positions he had no right to act upon the theory that he had the right of way. As was said in a recent case, Salmon v. Wilson, No. 27549, filed January 2, 1923, and not yet published:

"While the statute gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left, it manifestly does not intend to confer that right regardless of the distance the approaching cars may be from the point of intersection. It does not contemplate that the right may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it that, with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the intersection."

A vehicle going 12 miles an hour travels about 17 and one-half feet a second. If defendant was 150 feet or more from the intersection when plaintiff passed into it it would have taken him about 9 seconds to reach the point of collision. Noticing, as he must, that plaintiff was already crossing it he made no effort to stop his car until just before the collision. We cannot say under these circumstances that defendant's chauffeur could properly assert his claim to the right of way or that plaintiff, with only 45 feet to go, was not justified in proceeding across the intersection upon the assumption that any vehicle coming from the east, not within 150 feet of the crossing, was







too far away to contest his right to cross in advance of it.  
We cannot say that the court's finding is manifestly against  
the weight of the evidence.

Accordingly the judgment will be affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

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of the world and the history of the world in general  
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CARL H. LAHMAN,  
Appellee,

vs.

J. W. YOUNG,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

229 A. 289

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit in tort for damages to a plate glass window, resulting from a collision between an automobile and motorcycle whereby the latter was thrown out of its course across the street, over the curb and into the window. The chauffeur of defendant Young was driving the former, and defendant Hakanson the latter. A joint judgment for \$525 was rendered against them, and Young alone appeals, contending that the evidence does not show that he was chargeable with negligence.

There were two lines of automobiles moving south on the avenue in question, the left line at about fifteen miles an hour, and the right at a slower speed. The automobile was in the left line near the center of the street. There is a conflict in the evidence as to which line the motorcycle was moving in. Hakanson, and a person in the automobile following Young's, testified in effect that the motorcycle was in the left line just ahead of Young's automobile, and Young's driver, Gaulin, and Deben, his companion in the car, testified that Hakanson was attempting to turn from the right line into a space about fifteen feet between Young's car and one in front of it, and that Gaulin blew his horn, warning Hakanson of his encroachment, whereupon the latter turned back to his right, and as he fell back in the slower line of cars the left handle of the motorcycle grazed a tire carried on the right hand side of the automobile. This





tire was about six feet back from the front of the car. Both occupants of the car claimed that as it passed the motorcycle the handles of the latter wobbled. A witness for plaintiff claimed to have seen the car hit the motorcycle. It was not disputed that the accident was caused by the handle of the latter hitting said tire, and therefore after the automobile had partly passed the motorcycle. While Hokanson claimed that the handles of his motorcycle did not wobble, the inference we draw from the testimony is that had it not swerved from its course as the car was passing it the accident would not have happened. If, as we think, the preponderance of the evidence indicates Hokanson attempted to swing his motorcycle into the faster line of cars without having sufficient room to do so safely, and then in falling back, kept in such close proximity to the left line of cars as to cause a collision, there can be little doubt of his negligence. However, as he fell back the driver of Young's automobile might well have assumed that he would swing back in his line a safe distance from the left line of cars. After he fell back there was but a fraction of a minute before the accident happened. If Gaulin failed to exercise due care, it was in that very brief interval of time. As it was, according to the testimony of one of plaintiff's witnesses, he turned slightly to the left, apparently to avoid a collision. We fail to see that the evidence discloses a failure on his part to exercise due care under all the circumstances. The evidence indicates that the accident was due solely to the unexpected maneuvering of the motorcyclist and the wobbling of his motorcycle as he sought to extricate himself from the danger in which he had carelessly put himself.

Accordingly we think the verdict as to defendant Young was against the pre-ponderance of the evidence, and that the judgment as to him should be reversed with a finding of fact.

Morrill and Gridley, JJ.,

concur.

REVERSED WITH A FINDING OF FACT.



265 - 28100

## FINDING OF FACT.

We find that appellant, J. W. Young, was not guilty of negligence in the operation of his automobile as charged in the declaration.

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274 - 28109

JACK SAMUELS et al.,  
Appellees.

vs.

SAMUEL DORRIFIELD,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

229 I.A. 634

DELIVERED THE OPINION OF THE COURT.

This is a suit in forcible detainer. The burden of proof was on plaintiff to show he was entitled to possession of the premises, and that defendant unlawfully withheld the same from him. The only proof was testimony by one of the plaintiffs to the effect that he was part owner of the premises; that he made demand on defendant for rent; that defendant refused to pay the same, that defendant was served with the usual five days notice, and that he has paid no rent since. Thereupon plaintiff rested and so did defendant. Such proof had no tendency to show either that defendant was in possession of the premises or that the relation of landlord and tenant existed between him and plaintiff, which were essential to maintenance of the action. (Godair Estate v. Case, 320 Ill. App. 545; McFlusky v. Nelson, 179 Ill. App. 192; Bowman v. Mehring, 34 Ill. App. 389.)

The proof being insufficient to sustain the judgment it will be reversed.

REVERSED.

Merrill and Gridley, JJ., concur.

[illegible]

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PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

vs.

ANTON CHEPANIO,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

2291A.681

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This case comes here by transfer from the supreme Court, where it went on the common law record. Plaintiff in error was convicted upon trial before the court, after waiver of a jury trial, upon the following information:

"State of Illinois, )  
County of Cook, )ss.  
City of Chicago. )

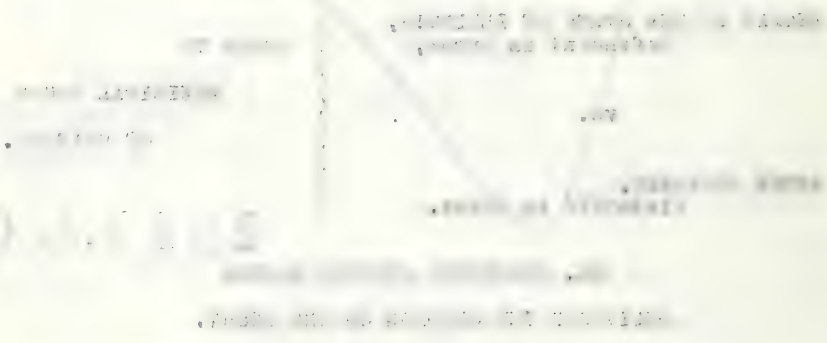
In the Municipal Court of Chicago.

Joseph Goldberg, a resident of the City of Chicago, in the State aforesaid, in his own proper person, comes now here into court, and in the name and by the authority of the People of the State of Illinois, gives the Court to be informed and understand that Anton Chepanio heretofore to-wit: on the 11th day of March, A. D. 1922 at the City of Chicago, aforesaid, did then and there unlawfully within prohibition territory transport by means of an automobile upon the public highway intoxicating liquor of greater alcoholic strength than one-half of one per cent in V. S. 31 Illinois Prohibition Law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Illinois.

X Joseph Goldberg.

State of Illinois, )  
County of Cook, )ss.  
City of Chicago. )

Joseph Goldberg being first duly sworn on his oath deposes and says that he resides at ..... that he has read the foregoing information by him subscribed and that the same is true.



The diagram shows a vertical line and a horizontal line. The vertical line is labeled 'Vertical Line' and the horizontal line is labeled 'Horizontal Line'. The diagram is titled 'Diagram of a Vertical Line'.

Vertical Line

Horizontal Line

Diagram of a Vertical Line

The diagram shows a vertical line and a horizontal line. The vertical line is labeled 'Vertical Line' and the horizontal line is labeled 'Horizontal Line'. The diagram is titled 'Diagram of a Vertical Line'.

Diagram of a Vertical Line

Vertical Line

Horizontal Line

The diagram shows a vertical line and a horizontal line. The vertical line is labeled 'Vertical Line' and the horizontal line is labeled 'Horizontal Line'. The diagram is titled 'Diagram of a Vertical Line'.



X Joseph Goldberg

Subscribed and sworn to before me this 13th  
day of March, A. D. 1922.

James A. Keuras,  
Clerk of the Municipal Court of Chicago."

It is contended that the information was not properly verified, and that the offense was a felony of which the trial court had no jurisdiction and, therefore, that plaintiff in error was prosecuted in violation of his constitutional rights. It was presumably on these points that the case was taken directly to the Supreme Court which, in transferring it here, held adversely to these contentions, saying that it had no jurisdiction, and that the information charged a misdemeanor. (People v. Cheppie, 306 Ill. 35.)

It is urged that the information is defective in various respects: First, in that it does not affirm that the defendant transported the liquor but merely gives the court so to be informed and understand. The language of the information is in the usual form and equivalent, we think, to charging that plaintiff in error transported the liquor.

Another alleged defect is that the words "at the City of Chicago" do not positively state that the public highway was "in" the City of Chicago. While the word "at" may be used in the sense of "near," as urged, it is also used to signify "in", and the context of the information clearly indicates its use in the latter sense.

Another alleged defect is that the clerk did not affix his seal to the jurat. The law does not require that the jurat shall be so authenticated, and this court takes judicial notice of who is the clerk of said court and of his power to administer the oath within the City of Chicago. (Schaefer v. Kienzel, 123 Ill. 430.)

# Joseph Delaney

Delaney was born in 1891 in the town of Delaney, N. Y.

He is now living in the town of Delaney, N. Y.

It is reported that the information was not given to

him, and that the witness was a friend of his. The witness had no objection and, therefore, that witness is now

was present in violation of his constitutional rights. It was

personally on these points that the case was taken up by

the Supreme Court which, in reviewing it, held adversely

to those convictions, saying that it had no jurisdiction, and that

the witness was charged a conspiracy. (People v. Delaney, 200

111. 111.)

It is noted that the information is contained in various

sources. First, it is said that the witness

testified that the witness was charged the same as in the

and was understood. The language of the testimony is in the

very form and consistent in tone, in showing the witness

in every particular the same.

Another alleged point is that the words "of the city

of Chicago" is not positively stated that the witness was

"in" the city of Chicago. While the word "in" may be used in the

sense of "near," as stated, it is also used in strictly "in," and

the context of the information clearly indicates it was in the

latter sense.

Another alleged defect is that the witness was not given

his oath in the proper form. The law does not require that the

shall be so administered, and this court found judicial notice

of who is the clerk of said court and of his power to administer

the oath to the city of Chicago. (People v. Delaney, 200

111. 111.)

(111. 111.)

Other alleged defects are that the information does not allege in the language of the Prohibition Act that the alcoholic contents of the liquor were greater than one-half of one per cent "by volume," and that it contains the meaningless phrase "V. S. 31, Illinois Prohibition Law." As the information charges what is forbidden by section 3 of said Act, and penalized by section 58, namely, transporting intoxicating liquor within forbidden territory, and also charges that it was "contrary to the form of the statute" etc., and as section 3 defines what is "intoxicating liquor," the language between the words "intoxicating liquor" and the clause "contrary to" etc., is entirely superfluous and may be rejected as surplusage.

There is no bill of exceptions in the record, and the questions presented are only such as relate to the common law record, principally to the sufficiency of the information. We think it was sufficient to support the judgment, which will be affirmed.

AFFIRMED.

Merrill and Gridley, JJ., concur.





111 - 27943

CITY OF CHICAGO,

Appellee,

vs.

ALBERT J. MOORE,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

22974 85 23

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On August 16, 1922, a quasi-criminal complaint, signed and sworn to by William W. Talcott, was filed in the Municipal Court of Chicago, in which it was alleged that

"Albert J. Moore, of said City of Chicago, on or about December 1, 1921, and divers times thereafter, at the city of Chicago aforesaid, did then and there hold divers meetings in the Fine Arts Building, Chicago, Illinois, on Wednesday and Sunday evenings in December, 1921, January and February, 1922, and deception or fraud of a serious nature was practiced thereat; said meetings were held under the auspices of a Society or Cult called The Life Institute; in violation of section 1989 of an ordinance of the City of Chicago."

Defendant, having been arrested, executed a written waiver of a trial by jury, and upon the trial, held on August 22, 1922, the court found him "guilty of a violation of the ordinance described in the complaint herein," and assessed a fine of \$100 against him, and entered judgment upon the finding. He appealed. No printed brief and argument is here filed on behalf of the City.

Six witnesses testified on behalf of the City and certain documentary evidence was introduced. The defendant did not introduce any evidence, but at the close of the City's evidence his motion for a finding in his favor was denied.

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Journal of Management Education 32(1)

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Source: *U.S. Census Bureau, 1960 Census of the United States, Vol. 1, General Characteristics of the Population, Table 1-1, p. 10.*

2013-2014

U.S. GOVERNMENT PRINTING OFFICE: 1967

*Time at work* was measured by asking respondents to indicate how many hours they spent working each week.

THE UNITED STATES DEPARTMENT OF AGRICULTURE

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After a careful examination of the transcript we are of the opinion that the judgment must be reversed, for the reason that the complaint is insufficient to sustain the judgment. It charges that on the evenings mentioned defendant held divers meetings in the Fine Arts Building in Chicago and that "deception or fraud of a serious nature was practiced thereat." It does not charge that defendant at such meetings practiced any deception or fraud in violation of the section of the ordinance mentioned, which ordinance is not contained in the bill of exceptions and of which we cannot take judicial notice. (Stott v. City of Chicago, 205 Ill. 281, 290.) Furthermore, while there is contained in the bill of exceptions evidence tending to show that defendant made an attempt to practice deception upon certain individuals at certain other places in the City of Chicago, it does not appear that said individuals were in fact deceived, or that defendant at any time practiced any deception or fraud in the "Fine Arts Building, Chicago," as charged.

The judgment of the Municipal Court is reversed.

REVERSED.

Barnes, P. J., and Morrill, J., concur.





210 - 28045

WILHELMINA ANDERSON,  
Appellee,

vs.

VILLAGE OF EVERGREEN PARK,  
Appellant.

27728  
APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.  
2291.1 13-4

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 10, 1922, Wilhelmina Anderson filed her verified petition in the Circuit court of Cook County praying for a writ of mandamus, directed to said Village of Evergreen Park, and to the President and Board of Trustees thereof, and commanding it or them to pay the amount of a certain judgment entered in her favor upon an award of the Illinois Industrial Commission, or that it or they levy and collect a tax in accordance with law upon all the property located in said Village and subject to taxation, sufficient to pay said judgment, and apply the amounts so realized to its payment. On the same day a summons was served upon the Village by delivering a copy thereof to Peter Merkel, president of its Board of Trustees, and the general demurrer of the Village to the petition was thereafter overruled, and on July 29, 1922, the Village filed its answer, to which petitioner interposed a general demurrer. On August 15, 1922, there was a hearing, resulting in the court sustaining petitioner's demurrer to said answer, and, upon the Village electing to stand by its answer, the court entered <sup>the</sup> judgment order appealed from, in which the court found that on October 11, 1921, petitioner recovered a judgment in said Circuit court against the Village in the aggregate sum of \$2500, payable in installments as therein provided, together with \$300 attorneys' fees, and \$10 costs, and that respondent refuses to pay the judgment and will not do so unless



compelled by the court; and ordered and adjudged that the writ issue directing the Village "forthwith to pay said judgment, or so much thereof as is now due and payable, or from time to time hereafter pay the remaining installments of said judgment when and as the same hereafter become due and payable," and that the President and Trustees of said Village (naming them) "forthwith make an appropriation for the payment of said judgment, and levy the amount thereof upon all the property subject to taxation within the Village of Evergreen Park, as provided by law, and do all other manner of things necessary and proper for the payment of said judgment." The only error assigned and relied upon is that the court erred in sustaining petitioner's demurrer to said answer.

The judgment of October 11, 1921, was entered under the provisions of Section 19, paragraph (c), of the Workmen's Compensation Act of 1913, (Hurd's Stat. 1921, Chap. 49, Par. 144), upon an award made by the Illinois Industrial Commission in favor of petitioner and against the Village. The petition alleges and the answer admits that notice of the judgment was given to the Village, that demand was duly made for its payment and that payment was refused.

The petition further alleges that on January 11, 1921, in accordance with the provisions of said Workmen's Compensation Act, petitioner, with her husband, Adolph Anderson, filed their petition with said Industrial Commission against the Village for an award of compensation "on account of the death of her son, Herbert Anderson;" that thereafter a hearing was duly had before an arbitrator, and on February 9, 1921, he made an award in favor of petitioner; and that thereafter the Village filed its petition for a review of the award, and further





proceedings were had before the Commission, whereby on June 3, 1921, the award was by it approved and confirmed. These facts are admitted in the answer. Attached to the petition are certified copies of the award and the decision on review. In the award it is stated that "Herbert Anderson, deceased, left him surviving, Wilhelmina Anderson (his mother), sole beneficiary of this award."

The petition further alleges that an application was made to the Circuit court for judgment upon the award, that it was entered, that the Village perfected an appeal therefrom to the Supreme court of Illinois, and that on June 17, 1922, said appeal was there dismissed for want of prosecution. These facts are also admitted in the answer, but it is alleged that the judgment "is void and unenforceable as law." This allegation is a mere conclusion of the pleader and is not admitted by the defendant. Furthermore, the certified copy of the judgment order which is attached to the petition as an exhibit shows on its face that the judgment is not void. (Peasale v. Green, 281 Ill. 52, 58); and the judgment cannot be attacked in this collateral proceeding. It is true that the certified copy of the judgment order discloses that an execution was ordered issued on the judgment against the Village, but the fact that such execution was inadvertently issued does not render the judgment void. (City of Gibson v. Murray, 120 Ill. App. 296, 300).

The petition further alleges that upon the entry of the judgment of October 11, 1921, it "became the duty of the respondent, or its President and Board of Trustees, to pay the same if there were moneys or funds available therefor, or, if there were no moneys or funds available therefor, to make provision for such payment in the next succeeding annual Appropriation Ordinance, and to levy and collect a tax upon all the



real and personal property located in said Village, subject to tax, for the payment of said judgment, and to pay the amounts realized therefrom upon said judgment;" that, not regarding said duty, the Village and its President and Board of Trustees have failed and refused to make provision for the payment, or to pay, the judgment; that on June 19, 1922, the Board of Trustees of the Village, at a meeting duly held for such purpose, passed the annual appropriation ordinance for the fiscal year 1922-1923 for said Village, yet, disregarding said duty, the Village and its President and Board of Trustees failed and refused to include the judgment in the ordinance, or to make any provision whatsoever for its payment; and that neither said Village nor its President and Board of Trustees will levy and collect a tax to pay said judgment unless compelled by a writ of mandamus so to do. In the answer of the Village to these allegations it was admitted in substance that no tax levy had been made to pay the judgment, and that the amount thereof had not been included in the ordinance, and for the reason "that the limit of tax as provided by the constitution of the State of Illinois had been assessed by the said respondent, and that a further tax levy would be unconstitutional and void, and also that, prior to the filing of this petition, an appropriation ordinance of said Village had been passed, and that under the laws and constitution of the State no further appropriation or tax levy ordinance could be passed after the time fixed by statute."

In City of Cairo v. Everett, 107 Ill. 75, a petition for mandamus was filed to compel the City of Cairo to levy a tax to satisfy a judgment against it in favor of the petitioner. The writ was awarded. In affirming the judgment the court said (p.78): "It was the duty of the city council to pay the judgment if there





were sufficient funds in the city treasury to pay it therefrom; if not, then to take the necessary steps to bring into the city treasury the requisite funds." In the answer in the present case there is no allegation that, either at the time the judgment of October 11, 1921, was entered, or at the time the appeal from the judgment was dismissed by the Supreme court on June 17, 1922, or at other times, the Village had not on hand sufficient funds available to pay the judgment. For aught that appears to the contrary the Village may have had on hand surplus moneys, or an unexpended balance of some fund or funds primarily intended for the payment of other obligations, which could have been used to pay the judgment. If it had not, it was its duty to allege those facts in its answer, and its failure so to do, in view of the admitted allegations of the petition, would alone, we think, have justified the court in taking the action it did. But, assuming that the Village did not have on hand such available funds, it was its duty without any demand to include this judgment (it having had notice thereof) in its annual appropriation bill for the year 1922. (City of Cairo v. Campbell, 116 Ill. 305, 309). Under Section 2 of Article VII of the Cities and Villages Act, the Village was required to pass its annual appropriation ordinance within the first quarter of the fiscal year, and, under Section 1 of Article VIII of said Act, to pass its tax levy ordinance on or before the third Tuesday in September. It is required that a certified copy of this ordinance be furnished the County Clerk, and with such copy a certificate of the amount of the levy required to pay judgments of courts of record. (Sec. 2 of the Act concerning the levy and extension of taxes, Hurd's Stat. 1921, Chap. 120, Par. 343 b). In the Campbell case, supra, it is said, (p. 310):



"It is thus clear beyond question that the demand was made in ample time for the correction of the annual appropriation bill before the day for adopting the ordinance levying the taxes. Undoubtedly the prohibition of further appropriations after the passage of the ordinance containing the annual appropriation bill, is obligatory upon the council so far as the subject of appropriation belongs to the class which it was discretionary for that body to include in or omit from the annual appropriation bill; but the plaintiff, whose valid, unsatisfied judgment against the city has, through wilful perverseness, or, it may be, negligence merely, been omitted from the annual appropriation bill, is not concluded thereby, for the members of the council can not thus be allowed, by their failure to perform their duty, to nullify the statute imposing that duty."

As to the allegations contained in the answer to the effect that the amount of the judgment of October 11, 1931, had not been included in the appropriation ordinance and that no tax levy had been made to pay it, for the reason "that the limit of tax as provided by the constitution of the State of Illinois has been assessed by said respondent, and that a further tax levy would have been unconstitutional and void," these are also mere conclusions of the pleader. In City of Chicago v. People, 215 Ill. 235, wherein it was sought by mandamus to compel the City to make the proper appropriation for the payment of a certain indebtedness, the answer of the City admitted the material allegations of the petition, but sought to avoid the issuance of the writ upon the grounds that the City did not have the financial means, income and revenue out of which to make the appropriation and that it was indebted in excess of the amount of its constitutional limitations and could not lawfully incur any further indebtedness. The Court held the answer insufficient, saying (p. 237): "When a petition for a writ of mandamus is filed, the answer of the respondent must state positive and definite facts upon which it relies in defense; the conclusions of the pleader are not sufficient, and if the answer consists merely of general statements and conclusions the relief will be granted."

It is from these papers, however, that the evidence was  
to be taken for the purpose of the present investigation.  
The fact that the papers were not in the hands of the  
author, but were in the hands of the person who was  
responsible for the collection of the evidence, is a  
fact which is of great importance in the present  
investigation. The fact that the papers were not in  
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collection of the evidence, is a fact which is of  
great importance in the present investigation.



And the court further said (p. 238): "The answer alleges the amount of the total income and the amount of the actual necessary operating expenses. There is no attempt to itemize the resources and there is no attempt to itemize the expenses, so the court can ascertain whether items included in these expenses are actually necessary or not. In other words, the items of receipts and expenses are merely the conclusions of counsel, and are so general in their terms that they do not come within the rules of pleading above announced. \* \* When application is made for relief and it is admitted that the claim is a proper debt against the city, the burden is upon the city to show that it is doing all in its power to liquidate the same. In order to avoid a writ of mandamus it must set out clearly and definitely, in detail, all of its items of receipts and expenditures, so that the court can see that it is not the fault of the municipality that the debt is not paid.\*\* To sustain the position of respondents would be to practically justify the repudiation of a debt admitted to be justly due and unpaid."

Our conclusion is that the court did not err in sustaining petitioner's demurrer to the answer of the Village, or, upon the Village electing to stand by its answer, in awarding the writ, and accordingly the judgment is affirmed.

AFFIRMED.

Barnes, F. J., and Merrill, J., concur.



250 - 28085

NEW CENTURY COMPANY,  
a corporation, Appellant,

vs.

FRANK BRASUS and  
MRS. FRANK BRASUS,  
Appellees.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

229 I.A. 684<sup>5</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for refusal of defendants to accept certain flour alleged to have been contracted for, the jury, on June 7, 1928, returned a verdict finding the issues against plaintiff, and the court entered judgment against it for costs and this appeal followed.

The action was commenced in the Municipal Court of Chicago on December 3, 1920. On the first trial a jury found the issues against Frank Brasus, the sole defendant originally, and assessed plaintiff's damages at \$500. A new trial was granted and thereafter plaintiff made Mrs. Frank Brasus an additional party defendant and filed an amended statement of claim.

In this amended statement plaintiff alleged in substance that defendants as co-partners operated a bakery business in Chicago; that on September 17, 1920, the parties entered into a written contract wherein plaintiff agreed to sell and defendants agreed to buy 360 barrels of certain brands of flour at certain prices therein mentioned; that under the terms of the contract the flour was to be delivered and paid for within 60 days from the date of the contract; that it was the duty of the buyers (defendants) to furnish shipping in-





structions to the seller (plaintiff) for the delivery of the flour, but that defendants wholly failed and refused so to do, and on November 15, 1920 (within the contract period) also refused to accept any portion of the flour, without fault on plaintiff's part, and so notified plaintiff; that during the whole of said period plaintiff was ready, willing and able to make delivery of the flour; that between the date of the contract and the date of defendants' said refusal the market value of the flour had materially declined; and that by reason of defendants' default plaintiff had suffered damages, to-wit, the difference between the contract price and the market value of the flour on the date of defendants' refusal, amounting to the sum of \$1226.

In their affidavit of merits to the amended statement of claim defendants admitted the making of the contract and that it was provided therein that the flour was to be delivered within 60 days from said date, and alleged in substance that it was further provided in the contract that the flour was to be delivered "f.o.b. Kensington," Chicago, at "116th and Michigan Team Track" of the Chicago and Western Indiana Railway Co., and was to be paid for on "arrival of draft with bill of lading attached at Kimbark State Bank," and that defendants were always ready, willing and able, up to and including November 16, 1920, to accept and pay for the flour, but that plaintiff failed to deliver it at the place mentioned, and failed during said period to send the draft with bill of lading attached to said bank, or to perform the terms and conditions of the contract. and defendants denied that it was their duty during said period to furnish any shipping instructions whatsoever, the same being fully contained in said contract, or that they had failed or refused at any time during said period to accept the flour, or that they had notified plain-

statements to the public (including) for the delivery of the  
front, but that statements should be made and not made to be so,  
and on November 10, 1944 (within the contract period) also  
refused to receive any portion of the front, although there is  
evidence of a part, and no written statement; that during the  
course of this period (including) was ready, willing and able to  
make delivery of the front; that between the date of the con-  
tract and the date of statements, was refused the contract value  
of the front and materially lessened; and that for reason of  
statements, (including) but not limited to, the  
difference between the contract value and the actual value of  
the front on the date of statements, (including) was the  
sum of \$100,000.

In their affidavit of denial to the grand jury  
of this defendant admitted the making of the contract and that  
it was provided therein that the front was to be delivered within  
the time from said date, and agreed to accept and that it was  
further provided in the contract that the front was to be delivered  
and that it was provided, (including) of which the defendant was  
aware at the time and before the contract was made, and was  
as he said for an "affirmative" of which all of the defendant's  
at the time of the contract, and in a statement made during the  
affirmative of which, as he said (including) November 10, 1944, as  
agreed and was the front, but that defendant failed to deliver  
it as the front was intended, and that during said period he said  
the front was not delivered to him, and as to the front  
that it was made with intent to defraud and to deliver  
information, and that during said period he said  
statements, as that they had failed to deliver at any time during

tiff that they would not accept it, or that they were guilty of any default.

On the trial the contract of September 17, 1920, was introduced in evidence. In addition to the place of delivery and the conditions of payment, as stated, it was provided that the order should not be binding "until the New Century Co. confirms same." The instrument was signed in its name by H. Lazar, its salesman, and also signed "accepted" by Mrs. Brasus. Plaintiff claimed that a day or two afterwards it mailed its written confirmation to defendants but both defendants denied that the same was ever received by them. The evidence, however, sufficiently shows a verbal confirmation of the order by plaintiff, of which confirmation defendants had notice. Plaintiff admitted that it did not during the 60-day period tender the flour to defendants, and did not send any draft with bill of lading attached to the Kimbark State Bank at any time, but contended that such tender was rendered unnecessary by reason of the fact that on November 15, 1920, (within the contract period) defendants flatly refused to accept delivery of the flour. This contention was supported by the testimony of said Lazar, but both defendants testified that the conversation with Lazar was not had until November 19th, that they then refused to accept the flour because the same had not been tendered within 60 days from the date of the contract, and that during the contract period they had been ready, willing and able to accept it and to comply with their contract. The defendants' testimony as to the date of said conversation with Lazar was sustained by certain documentary evidence. Plaintiff introduced evidence tending to show its damages as alleged.

We are unable to say that the verdict is manifestly against the weight of the evidence. And we do not think that any error, prejudicial to plaintiff, was made by the trial court in the rulings on the admission or rejection of evidence.







Counsel for plaintiff contend that the judgment should be reversed because of certain errors in the court's oral charge, to which objections were made at the time. As to those portions of the charge concerning plaintiff's confirmation of the order we do not think that the jury were misled when the charge in its entirety is considered. On the question of the tender of the flour by plaintiff, the jury were instructed in substance that if defendants did not refuse within said 60-day period to accept the flour it was the duty of plaintiff to tender or offer to deliver the flour within said period, and that if the jury believed from the evidence that during said period the defendants did not refuse to accept the flour and that plaintiff did not at any time tender the flour, the defendants could not be held liable. We do not think that there was any error in the court's charge in these particulars. (Lassen v. Mitchell, 41 Ill. 101; Fulton Bag & Cotton Mills v. Frankel, 188 N. Y. Supp. 709.) On the contrary, we think that the jury was fully and fairly instructed. Counsel argue that the failure of defendants to furnish shipping instructions excused plaintiff from making any tender of the flour. We do not think so. It was expressly provided in the contract or order that the shipment of the flour was to be made "f.o.b. Kensington," at the "116th & Michigan Team Track" of the Chicago and Western Indiana Railway Co., within 60 days from the date of the contract. It was not necessary for the defendants to give any further shipping instructions. By the provisions of the contract plaintiff knew where and within what time to make or tender delivery.

In our opinion the judgment of the Municipal Court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Morrill, J., concur.



JAMES S. DEMING, administrator  
of the estate of CHARLES ENKE,  
deceased.

Appellee.

vs.

CHICAGO RAILWAYS COMPANY,  
CHICAGO CITY RAILWAY COMPANY,  
CALUMET & SOUTH CHICAGO RAILWAY  
COMPANY, and THE SOUTHERN STREET  
RAILWAY COMPANY, operating under  
the name and style of CHICAGO  
SURFACE LINES.

Appellants.

APPEAL FROM

CIRCUIT COURT OF

COOK COUNTY.

228 I.A. 635

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$3,000 entered against the defendant railway companies by the Circuit Court of Cook County, in an action for damages for personal injuries sustained by Charles Enke about five o'clock on the afternoon of May 17, 1919, as the result of the collision of a two-horse truck wagon, which he was driving, and a southbound State street car, south of 14th street in the City of Chicago.

The declaration, consisting of one count, charged the defendants with negligence in propelling the street car at an excessive rate of speed and without giving Enke warning of its approach, whereby the street car ran against the wagon and Enke was thrown violently to the ground and seriously injured. The defendant filed a plea of the general issue. The case was tried before a jury shortly before Christmas, 1921. Enke testified as a witness in his own behalf, and the jury returned a verdict finding the defendants guilty and assessing his damages at \$3,000. On February 4, 1922, Enke's death was suggested, and James S. Deming, as administrator of his estate, was substituted as plaintiff. On March 11, 1922, the court entered judgment upon the verdict against defendants.

*[Faint handwritten notes and markings are visible across the page.]*

Source: U.S. Department of Commerce, Bureau of Economic Analysis, *Survey of Current Business*, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2

[illegible][illegible]



Various grounds for a reversal are urged and argued by counsel for defendants. Their main contention is that the judgment should be reversed without a remandment of the cause because it appears by a clear preponderance of the evidence that defendants were not guilty of negligence and Inke was guilty of contributory negligence.

The following facts were disclosed on the trial:

State street is a north and south street, and 14th street intersects it at right angles. There were double street car tracks in State street, northbound street cars moving on the east track and southbound cars on the west track. The Santa Fe freight house extended along the west side of State street, south of 14th street, but the east face of the building was about 64 feet west of the line treated as the west line of State street, so that there was a considerable open space west of said line. Adjoining the building was a loading platform or platforms where teams came to receive merchandise. There was a series of doors leading into the freight house. East of this open space was the paved roadway of State street and the width of that roadway, west of the west car track, was 22-1/2 feet. There was no sidewalk on the west side of State street. Inke's two-horse wagon had been standing at either the third or fourth door of the freight house south of 14th street. The third door is 127 feet south of 14th street. Inke drove his wagon away from the platform, intending to cross both street car tracks and then proceed north on the east side of State street. When he left the platform there were some wagons in the open space between the freight house and State street, and there was also a considerable traffic of wagons and other vehicles, west of the street car tracks, moving south in State street. Inke testified in substance that after he left the platform he drove in a northeasterly direction, first in said open space and then on the west side of State street, towards 14th street; that upon



approaching the west street car track he saw the southbound car standing at the north crosswalk of 14th street; that he drove his team diagonally across said track and in front of the standing car which was then about 10 feet away; and that the car suddenly started and ran into the wagon and he was thrown to the ground. He further testified: "I noticed a car standing there and I wasn't sure whether it was going to come and get me, so I run and took my chances to go ahead; \* \* I got the horses over and the front part of the wagon, but didn't seem to have time enough to get out of the way entirely; \* \* the street car hit the wagon not quite amidships, right ahead of the hind wheel."

Every other occurrence witness, including Anke's witness, Brown, a police officer and who was on the rear platform of the southbound car, contradicted Anke as to the place where the collision occurred. Brown testified that the car hit the wagon about 150 feet south of 14th street. Five occurrence witnesses testified for the defendants, the motorman and conductor of the southbound car, the motorman of a northbound car, a passenger on the front platform of the southbound car, and a passenger on the front platform of said northbound car. Defendants' version of the accident, sustained by the testimony of these witnesses, was in substance that the collision took place about 125 feet south of 14th street, practically in the middle of a block; that the southbound car was moving at a moderate rate of speed, about 14 miles per hour; that considerable wagon and other vehicle traffic was moving southward and immediately west of the west track; that out of this traffic suddenly appeared Anke's team moving on a northeasterly direction and about to cross said west track; that the motorman of the southbound car attempted to stop it but could not do so in time to avoid the collision, although its speed was materially slackened; and that Anke, although aware of the car's approach when it was a considerable distance away,



approaching the west stand and found to me the position and  
 appearing as the north entrance of the street; that as I moved  
 his face suddenly turned and I was in front of the stand.  
 But my object was then about 10 feet away, and that the man walked  
 by without me and then the man and the woman in the passage.

He turned back: "I noticed a man standing there and I  
 wasn't sure whether it was going to come out and see, so I ran and  
 took my chance to be about 10 feet away from the stand and the  
 front part of the woman, but I don't know how far away she  
 got out of the way suddenly." The almost as if the woman  
 got into the middle of the stand again."

"Very little conversation followed, including what's this  
 head, brown, a little white and the man on the left; I don't  
 the woman and, sometimes, she is in the place where the  
 building occurred. When I walked out the way of the  
 about 10 feet away of the stand. I don't know whether  
 back of the stand, the woman and the man at the  
 entrance of the stand, the woman and the man at the  
 the front of the stand, the woman and the man at the  
 front of the stand, the woman and the man at the  
 the woman, as I saw the woman in the stand.  
 was in the stand when the woman came from the stand and I saw  
 about 10 feet away, as I saw the woman in the stand; that  
 the woman and the man at the stand, the woman and the man at the  
 it was not clear, as I saw the woman and the man at the  
 stand, as I saw the woman and the man at the stand.  
 moving as I saw the woman and the man at the stand, as I saw  
 stand; that the woman and the man at the stand, as I saw  
 it was not clear, as I saw the woman and the man at the  
 the woman and the man at the stand, as I saw the woman and the man at the  
 at the stand, as I saw the woman and the man at the stand, as I saw



speeded up his horses and attempted to cross the track in front of the car, instead of waiting for it to pass.

After a careful review of the evidence we are of the opinion that the defendants cannot be held liable in damages for the injuries which Enke sustained, because he was guilty of contributory negligence (Chicago Union Traction Co. v. Jacobson, 217 Ill. 404, 408; Fienta v. Chicago City Ry. Co., 284 Ill. 246, 264; Tyson v. Union Traction Co., 199 Pa. St. 264, 266; Moreland v. Chicago City Ry. Co., 141 Ill. App. 164, 167; Purcell v. Chicago City Ry. Co., 231 Ill. App. 343, 348); and because, under the circumstances, it cannot be considered that the motorman of the southbound car was guilty of negligence. (Spencer v. Chicago City Ry. Co., 230 Ill. App. 436, 440.)

The judgment of the Circuit Court is reversed.

REVERSED WITH FINDING OF FACTS.

Barnes, F. J., and Merrill, J., concur.

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that a number of the students at the school were

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268 - 28103

FINDING OF FACTS.

We find as ultimate facts in this case that at the time and place of the accident Enke was guilty of negligence which contributed to his injuries, and that the defendants were not guilty of negligence.





137 - 27612

HERMAN L. ALEXANDER,  
Appellant,

vs.

DAVID BELSON, doing business  
as Belson Manufacturing Company,  
not incorporated,  
Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

229 I.A. 635<sup>2</sup>

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for costs rendered by the Superior Court of Cook County in favor of defendant, who is appellee here, in an action of assumpsit. There was a jury trial. Appellant, who was plaintiff in the court below, seeks a reversal upon the ground that the judgment is contrary to the manifest weight of the evidence and that the trial court erred in its rulings on the admissibility of certain evidence, and that all the instructions given to the jury were erroneous.

The amended declaration alleged, in substance, that on January 19, 1920, defendant agreed to manufacture exclusively for plaintiff certain copper kettles and covers therefor at fixed prices, which plaintiff agreed to pay upon delivery of the articles as ordered by him; that the agreement was to continue for one year from January 19, 1920; that defendant violated this agreement by failing to manufacture exclusively for plaintiff during the period named and by manufacturing and selling said articles to customers of plaintiff at lower prices than those charged by plaintiff, and that finally, on and after May 3, 1920, defendant refused to manufacture and deliver the kettles and covers as ordered by plaintiff, and refused to fulfill the alleged agreement of January 19, 1920. Defendant



pleaded the general issue, accompanied by an affidavit of merits which specifically denies the existence of the alleged agreement of January 19, 1920, and denies any indebtedness whatever from defendant to plaintiff, but on the contrary alleges that plaintiff is indebted to defendant in the sum of \$3,046.60. An additional plea was filed setting up the statute of frauds and a former action by defendant against plaintiff to recover the debt alleged to be due him. The judgment in the former case was reversed by this court in an opinion filed November 1, 1921, entitled Nelson v. Alexander, number 26421. The opinion in the former case has no bearing upon the present controversy and need not be discussed. The agreement set forth in the pleadings in that case is quite different from the one involved herein, although relating to the same subject-matter.

The issues thus raised made it incumbent upon plaintiff to prove the existence of the contract and compliance on his part with its terms, a breach by defendant and damages to plaintiff resulting therefrom. The evidence as to the making of the agreement, which is oral, is confined to the testimony of plaintiff and defendant. The former testified to a conversation with defendant on some Saturday in January, 1920, at which they agreed upon prices for the various sizes of kettles and covers, and defendant agreed to manufacture them exclusively for plaintiff for a period of one year. Incidentally we note that January 19, 1920, was Monday and not Saturday. Defendant, while not denying that an interview took place between them in the month of January, does deny any agreement on his part to manufacture exclusively for plaintiff for any period of time whatever. Taking plaintiff's version of the interview, it is apparent that the exact date thereof is uncertain and that defendant did not in specific terms enter into any agreement other than to manufacture



placed the general issue, recommended by an affidavit of service  
 which specifically denies the existence of the alleged partnership  
 of January 19, 1937, and denies any indebtedness whatever from  
 defendant to plaintiff, but in the contrary alleged that plaintiff  
 still is indebted to defendant in the sum of \$2,000.00. The  
 affidavit also was filed and noted on the records of the court and  
 a return was made by defendant against plaintiff to recover the  
 debt alleged to be due him. The judgment in the return was  
 reversed by this court in an opinion filed November 1, 1937, in  
Alfred Weiss v. Plaintiff, et al., and entered in the  
 return was an affidavit from the plaintiff and was  
 not so returned. The judgment was reversed in the return in  
 that case in order to return from the plaintiff to the  
 plaintiff in the sum of \$2,000.00.  
 The return was filed with the plaintiff and was  
 filed to prove the existence of the partnership and partnership as  
 his part with the return, a return by defendant and partner in  
 plaintiff's business partnership. The return was to the return of  
 the partnership, which is now, as shown by the return of  
 plaintiff was returned. The return was filed to a partnership  
 with defendant as well as being in partnership, and as such was  
 noted upon return for the return of the return and return,  
 and return was returned to defendant and return to the return  
 for a period of one year. Indebtedness as well as being  
 in partnership and return, which was  
 being made on defendant's return from the return  
 of return, and return and return on the return to return  
 defendant for plaintiff for the return of the return, which  
 plaintiff's return of the return, as is shown, that the  
 return was returned to defendant and that defendant did not



and deliver the articles at a certain specified price. Even if the oral testimony as to the making of the alleged exclusive agreement can be regarded as evenly balanced, the surrounding circumstances and the elements of probability tend to sustain defendant's version of the interview. The business of manufacturing and selling copper kettles seems to have been lucrative and desirable at that time. The evidence shows that there was then keen competition in it. The alleged agreement would have placed defendant entirely in plaintiff's power as far as this industry was concerned, and would have prevented him from manufacturing except for the purpose of filling plaintiff's orders, without any assurance whatever as to the probable amount of such orders or even specifying the minimum amount. If the business of selling kettles proved lucrative, plaintiff could demand service from defendant to any extent, but if the business proved unprofitable plaintiff was under no obligation to give defendant any orders whatever after defendant had been to the expense of equipping his shop for the filling of such orders. Such a contract may well be held to be lacking in mutuality. There was no requirement whatever upon plaintiff during the entire period of its supposed existence to place any orders for kettles with defendant. Crane et al. v. Crane, 108 Fed. 869; Coldblast Transfer Belt Co. v. K. C. Belt Co., 114 Fed. 77.

Plaintiff contends that defendant admitted the existence of the contract as shown by the testimony of the two witnesses Sieger and Thieckelman. While it is true that defendant did not deny having contractual relations with plaintiff, as these witnesses testify, yet we cannot say that in express terms he admitted the existence of a contract of the precise nature claimed by plaintiff. The verdict of the jury shows that they accepted the version of defendant as to the relations between the parties. There was evidence sufficient to sustain this conclusion and we are unable



to say that the verdict was contrary to the manifest weight of the evidence. The judgment should therefore not be disturbed. The weight of the evidence does not depend necessarily on the number of witnesses, and it is for the jury to decide which of them was more worthy of belief. These familiar principles require no citation of authorities in their support.

The business relations between the parties continued during the months of February, March and April, 1930. In the latter part of April plaintiff was indebted to defendant to the amount of \$3800 for kettles manufactured and delivered on plaintiff's orders. This indebtedness does not seem to be disputed by plaintiff, who says that at about that time he became suspicious that defendant was selling kettles and covers to others in violation of the supposed agreement. He thereupon demanded an inspection of defendant's shipping records, which was allowed. As a result of this inspection he claims to have found verification of his suspicions and fixed the amount of his damages on account of defendant's wrongful conduct at the sum of \$1,205.85. Defendant offered to allow plaintiff a credit for that amount upon the sum due him from plaintiff provided the latter paid the balance of his debt. Plaintiff refused to do so unless the latter gave further assurance that he would manufacture and deliver in accordance with plaintiff's theory of the agreement between them. Defendant thereupon refused to make further deliveries. Defendant testified, and plaintiff does not deny, that plaintiff agreed to pay for the merchandise ordered by him within ten days after delivery. It therefore appears that plaintiff was in default and failed to show compliance on his part with the terms of his agreement, which was an essential element of his case.

We have examined the rulings of the trial court as to the admissibility of certain evidence, of which appellant complains, and find no reversible error in that respect. It is







unnecessary to review the alleged errors in detail.

The instructions given by the court, taken as a whole, fairly state the law applicable to the case and afford no ground for a reversal.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

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101 - 27933

JOSEPH V. ALTMAN,  
Appellee,

vs.

EVENING AMERICAN PUBLISHING  
COMPANY, a corporation,  
Appellant.

APPEAL FROM

CIRCUIT COURT OF  
COOK COUNTY.

229 I.A. 635<sup>6</sup>

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Evening American Publishing Company from a judgment of the Circuit Court of Cook County for \$5,000 in favor of plaintiff, being the amount of damages awarded by the jury for alleged libels published by defendant on April 24, 1920. Appellee was plaintiff and appellant was defendant in the court below and will be so designated herein.

The declaration, consisting of two counts, sets forth two separate publications made by defendant upon the same day in successive but different issues of the Chicago Evening American, a daily newspaper published by defendant in Chicago. Both counts after the usual allegations of plaintiff's good name, credit and reputation and a denial of the truth of the words of which plaintiff complains, set forth the alleged libels with the innuendoes. It is unnecessary for us to repeat here the alleged libelous articles which it is claimed by plaintiff accuse him of complicity in the murder of one Edward Coleman, of being a "free lance gunman" and of being connected with certain criminal acts. Defendant filed a plea of the general issue and gave notice that it would interpose as special defenses that the alleged libelous words were true and were published for justifiable ends and with good motives, followed by a detailed statement of the evidence which would

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This is an account of the various persons identified  
Company from a statement of the District Court of Cook County  
for \$2,000 in favor of himself, being the amount of damages  
awarded by the jury for alleged libel published by defendant  
on April 24, 1931. Plaintiff was libeled and awarded the  
damages in the sum of \$2,000 and will be so determined herein.  
The defendant, consisting of two counts, sets  
forth two separate publications made by defendant upon the  
same day in successive but different issues of the Chicago  
Evening Journal, a daily newspaper published by defendant in  
Chicago. Each count alleges the same allegations of plaintiff's  
good name, credit and reputation and a denial of the truth of  
the words of which plaintiff complains, yet leaves the alleged  
libels upon the defendant. It is unnecessary for us to  
repeat here the alleged libelous articles which it is claimed  
by plaintiff caused him to negligently in the matter of the  
above account, of being a "free lance" and of being  
connected with various criminal acts. Defendant filed a plea  
of the general issue and gave notice that it would introduce  
as expert witnesses that the alleged libelous words were true  
and were published for legitimate ends and with good motives.  
Followed by a detailed statement of the evidence which would



be offered to sustain such defenses.

The record shows that before the introduction of any evidence by defendant, plaintiff, as a part of his case in chief, offered in evidence a certified copy of the record of the Criminal Court of Cook County showing that plaintiff and his brother had been found not guilty by a jury of the charges contained in a certain indictment based upon one of the affairs mentioned by defendant in its notice of justification. This document was improperly received in evidence over defendant's objection. Defendant could not be affected by proceedings to which it was a stranger. It had none of the rights to which it would have been entitled if it had been a party to the action. The proceeding was a public prosecution, in which defendant had no powers or agency and no individual rights or interests at stake. Corbley v. Wilson, 71 Ill. 209. The rule announced in Corbley v. Wilson has been followed and cited with approval in numerous cases. People v. Newbold, 260 Ill. 196; Illinois Steel Co. v. Industrial Commission, 290 id. 594; Watson v. Kammerer, 203 Ill. App. 31.

Counsel for plaintiff seems to admit the rule above stated, but contends that the trial court committed no reversible error in receiving the record in evidence, for the reason that prior to its introduction in evidence defendant's counsel, by his examination of a witness, had already proved plaintiff's acquittal of the charge in question, citing Hill v. Carson, 177 Ill. App. 314, and other cases. We have examined the record in this respect and find that the evidence to which plaintiff's counsel refers was a voluntary statement made by plaintiff, which was not responsive to the question put to him on cross-examination and does not in express terms refer to the charge above mentioned.

be allowed to make any such statement.

The record shows that neither the introduction of any

evidence by defendant, plaintiff, or a party of his own in  
evidence, although in evidence a certified copy of the record of the

original record of such records showing that plaintiff and his

defendant was made known and being by a copy of the original con-

cluded in a certain instance based upon one of the exhibits

mentioned by defendant in his motion for judgment. This

document was improperly received in evidence over defendant's

objection. Defendant could not be allowed to present it as

evidence in a summary. It had none of the things in which it

would have been admitted. It is not a copy of the original.

The procedure was a proper procedure, in which instance had

no basis on which and no restrictive rights on interests of

them. Wright v. Wright, 111 Cal. 101. The rule announced in

Wright v. Wright has been followed and cited with approval in

many cases. Wright v. Wright, 111 Cal. 101. Wright v. Wright, 111

Cal. 101. Wright v. Wright, 111 Cal. 101. Wright v. Wright, 111

Cal. 101. 21.

There is no doubt that the rule here

stated, but defendant did not trial court admitted as competent

evidence in receiving the record in evidence, for the reason that

it is not introduced in evidence as a copy of the original, or

the admission of a witness, but simply proved plaintiff's

evidence of the record in evidence. Wright v. Wright, 111

Cal. 101. 21. The other cases. In many instances the record is

not brought out and the witness is asked to state plaintiff's

evidence and is not a voluntary statement made by plaintiff.

There is no doubt that the rule here

stated, but defendant did not trial court admitted as competent

At the request of plaintiff's counsel the court gave the following instruction:

"You are instructed in regard to the evidence of a witness that is known in law as an accomplice, that while it is a rule of law that a person accused of a crime may be found guilty upon the uncorroborated testimony of an accomplice, still the jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all other evidence in the case; and the jury ought not to find a person guilty upon such testimony alone, unless, after a careful examination of such testimony, and all the evidence in the case, they believe from a preponderance of all the evidence that the person charged is guilty of the crime and that the jury can safely rely upon the evidence of the accomplice."

This instruction was erroneously given. The present action is a civil suit to recover damages. Defendant was not accused of committing a crime. It alone was responsible for its publications. While it had agents and employees, it had no accomplices in the sense in which the word is used in the foregoing instruction. This instruction had the effect of advising the jury that some of defendant's witnesses could be regarded as accomplices whose testimony should be viewed with great caution. In other words, the credibility of defendant's witnesses was to be judged by different standards than those applied to plaintiff's witnesses. It has frequently been held to be error for the court to single out a class of witnesses and to instruct specially as to them. If the witnesses referred to were competent, the jury should not have been instructed to regard their testimony with great care and caution.

For the errors above indicated, the judgment of the Circuit Court is reversed and the case remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.







141 - 27975

LOTTA L. THRANE,  
Appellee.

vs.

VICTOR THRANE,  
Appellant.

APPEAL FROM

CIRCUIT COURT OF  
COOK COUNTY.

229 I.A. 635

MR. JUSTICE BORRILL DELIVERED THE OPINION OF THE COURT.

Defendant has appealed from a decree of the Circuit Court of Cook County entered in a divorce case June 26, 1922, whereby complainant was awarded solicitor's fees to the amount of \$1,000 and alimony pendente lite to the amount of \$300 per month, and defendant was enjoined from encumbering or disposing of certain personal property and household goods.

As the record contains no certificate of evidence and no findings of fact are set forth in the decree, it is impossible for us to know upon what evidence the chancellor based his decree. Assuming that evidence was heard, as the decree recites, it was the duty of complainant, in whose favor the decree was rendered, to preserve in the record the evidence justifying such decree, either by findings of fact in the decree, master's report, deposition or certificate of evidence. The failure to do so has been held by the reviewing courts of this state to be ground for reversal in a number of divorce and separate maintenance cases. Ohman v. Ohman, 233 Ill. 632; French v. French, 302 id. 152; Becklenburg v. Becklenburg, 232 id. 120; Berg v. Berg, 223 id. 309. This is a general rule in all chancery cases, and appellee has presented no authorities indicating that this rule does not apply to the present case. There are, however, other reasons which in our judgment require a reversal of the decree in question. The record presents for

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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DOI 10.1002/pola.20109

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10. The following are the names of the persons who have been appointed to the various committees of the Board of Directors:

*Journal of Management Education* 30(6)p.789-804

1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

100 102 104 106 108 110 112 114 116 118 120 122 124 126 128 130 132 134 136 138 140 142 144 146 148 150 152 154 156 158 160 162 164 166 168 170 172 174 176 178 180 182 184 186 188 190 192 194 196 198 200

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

— <http://www.fishbase.org> y <http://www.fishbase.org> para el acceso a la información.

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in all the country houses and villages that surround the city

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our consideration only the original and amended bills, the answer, a deposition of complainant taken on behalf of defendant and the decree in question.

The original bill filed April 7, 1922, alleged the marriage of the parties on October 23, 1908; that complainant is without means and that defendant is the owner of stocks and bonds of James D. Lacey and Company of the value of several hundred thousand dollars and of other valuable personal property. It charged that on June 1, 1913, defendant committed adultery at Chicago with an unknown woman; that since that time defendant has been guilty of adulterous practices with various unknown women and that complainant had learned of these unlawful acts within the last four months. The amended bill, filed June 1, 1922, after repeating the allegations contained in the original bill, sought to make the charges of adultery more specific by setting forth that the offense was committed in June, 1914, instead of 1913, as alleged in the original bill, with a woman named "Ethel," whose personal appearance is described, in an apartment in Chicago occupied by complainant and defendant as a place of residence and while complainant was absent from Chicago. No other ground for divorce is alleged and no allegations other than those in the original bill are made as to the financial resources of defendant. While it is true that the bill and amended bill were verified by the affidavit of complainant, it is apparent that the charges of adultery against defendant are based upon information solely. Under such circumstances, the bill is entitled to no weight as evidence. Deimal v. Brown, 136 Ill. 594; Brown v. Brown, 145 N. Y. Supp. 471.

The answer of defendant is so detailed and voluminous that only a brief review of its contents can be given. It admits all jurisdictional facts, and avers that on January 15, 1921,





the parties were living together as husband and wife; that complainant being in ill health, for the purpose of procuring medical treatment, and with the knowledge and consent of defendant, on that date went to New York, where she established herself at the Seymour Hotel, at which her father and mother were then residing; that from the time of complainant's departure for New York in January, 1921, and during the spring and summer of that year the parties corresponded, exchanging letters almost daily; that complainant's letters were affectionate and did not inform defendant until about September 1, 1921, that complainant intended to cease living with him as his wife; that during that month complainant wrote defendant to the effect that she would no longer live with him and that they must separate. The answer sets forth in great detail the correspondence between the parties, which it is unnecessary to repeat, as this correspondence will be considered later in connection with defendant's deposition. The answer further averred that subsequent to November 26, 1921, which was the date of the last letter, defendant had several interviews with complainant's father, James D. Lacey, in which the latter requested defendant to consent and agree that complainant might procure a divorce from defendant without contest on his part; that defendant has fulfilled all of his marital obligations and expressly denies the acts of adultery charged in the bill of complaint.

The answer furnishes detailed information as to defendant's financial condition, from which it appears that for many years he had been a partner with his father-in-law, James D. Lacey, and one Deal in a prosperous lumber business in which defendant had a drawing account; that the firm became financially embarrassed in 1920 and 1921, of which fact complainant had full knowledge, so that a reorganization and re-financing of its



A company, a corporation, was formed and the assets of the partnership were transferred to it, defendant receiving stock and cash for his interest. The answer further shows that the new corporation is heavily indebted and that under the terms of its obligations, no dividends can be paid upon its stock for many years; that defendant, as a result of the reorganization, has been separated from his former connection with the business, so that he is no longer in receipt of any salary or income therefrom, and that while he is the owner of several thousand shares of the stock of the company, he can derive no dividends from said stock on account of the corporate obligations above mentioned. The answer makes a complete disclosure as to defendant's financial condition, which is conceded by complainant to be true, and which indicates that defendant has no money with which to pay the alimony and solicitor's fees allowed by the decree.

That the defendant is without funds with which to pay the decree for alimony and solicitor's fees seems to have been recognized by the chancellor, by the provision inserted in the decree to the effect that defendant might discharge his liability for alimony and solicitor's fees by the transfer and conveyance to complainant of a sufficient number of shares of the preferred capital stock of the James D. Lacey Company at the rate of \$90 per share.

Appellant contends that while the merits of the case are not under consideration in an application for temporary alimony, yet it is incumbent upon plaintiff to show that she is proceeding in good faith and has probable grounds for her suit. This proposition is sustained by numerous decisions of the reviewing courts of this state. Harding v. Harding, 144 Ill. 185; Cooper v. Cooper, 185 id. 163; Wheeler v. Wheeler, 18 Ill. App. 330; Hawson v. Hawson, 87 id. 491. This seems to be admitted by appellee, who cites several of the above author-



[illegible][illegible]

1. The Commission has received information from the Department of the Interior, Bureau of Land Management, that the following lands are owned by the United States and are available for disposal:



ities, to show that the granting of temporary alimony is within the discretion of the trial court and will always be allowed when the wife has shown by her pleadings a meritorious cause of action and is proceeding in good faith. Harding v. Harding, supra; Cooper v. Cooper, supra.

In the present case the only showing of probable cause or of complainant's good faith in bringing the suit is contained in the bill and amended bill, in which complainant charged defendant with having committed adultery under circumstances showing that her charge is based upon information and belief only. The source of her information is not disclosed to the court by the bill, affidavit or otherwise. Defendant has denied these charges categorically and in his answers has alleged facts and circumstances which render doubtful the truth of many of complainant's allegations. Upon the question of complainant's good faith in prosecuting the suit her deposition already mentioned has an important bearing. This deposition was taken June 21, 1922, and so far as the record shows, was the only evidence before the court when the decree in question was entered June 26, 1922. She testified that she first learned of defendant's alleged adulterous practices on or about December 7 or 8, 1921, while she was living at the Seymour Hotel in New York and while she was in her mother's room at that hotel. Her husband was not present at the time. It is therefore obvious that her charges must be based upon information given by others. Under the advice of her counsel she refused to state the source of her information. She admitted the writing of the letters to her husband dated September 26 and 29, 1921, October 12, 1921, and November 28, 1921. Upon cross-examination she stated that ordinarily she spent the time from April or May until September or October in each year with her parents; that she went to the Seymour Hotel in January, 1922, where her father obtained rooms for her. The letters above mentioned from complainant to defend-



ent were offered in evidence. These letters were long and written in a friendly manner. We cannot undertake to give a complete abstract of their contents, but some quotations therefrom seem necessary as tending to show complainant's lack of good faith in prosecuting the suit. In her letter dated September 29, 1921, she said, "You must not feel that because we cannot live as man and wife, that we cannot always be friends, for many people are, who have been separated for years. And there is no reason why people cannot be friends just because they do not wish to continue to occupy the same home. I may have very peculiar ideas as to life, but we need many kinds of food to nourish our bodies, just so, I believe, we need many kinds of mentalities to nourish our minds. And so if we find that certain mentalities are not nourishing our minds, we must find others, but that is no reason we cannot still like the old mentalities, although we do not wish to indulge in it or them so much. I may be crazy but that is just how I feel." In her letter of September 25, 1921, she discusses the financial difficulties of the James O. Lacey Company, showing considerable familiarity therewith. In her letter of October 11th she said, among other things, "My own conscience is absolutely clear as to my loyalty and when you say that I will never be happy if I take the step I am about to take, that of separating and being divorced from you, no man can say whether or not I will be happy. I only know that I want to go on alone, and I am willing to take any chances. \* \* \* For both our sakes, the sooner we terminate this harrowing situation, the better, for it is killing us both, and to write any more on the subject or to have any interview is absolutely useless." In her letter of November 28, 1921, she said, "I have told all our mutual friends that we have separated, so there need be no embarrassment as far as that is concerned, and is it not more humiliating to have one go some place where a divorce



and were offered in evidence. These letters were from the writer  
in a friendly manner. He cannot understand it give a complete statement  
of their contents. But some interesting questions were suggested  
concerning the same correspondence. It was at first said in proceeding  
thereafter. In one letter which was written by Mr. Bell, the wife, "The  
must not look that because he cannot give us more the wife, but  
we cannot always be friends, but many people are, who have been  
separated for years. And there is no reason why people should be  
friends just because they do not wish to continue to remain the  
same ones. I may have very beautiful skin as to life, but as near  
very kind of food in nature, but not, I believe, as  
good many kinds of nourishment to nourish my skin. And as to it to  
find that certain nourishment was not nourishing my skin, so  
must find other, but that is the reason - a good thing is - the  
the nourishment, although we do not wish to indulge in it or than  
no more. I say he says that he has not found it. He has  
factor of happiness, Mr. Bell, has discussed the physical differ-  
ences at the house. - larger company, however, nourishing  
nourishment. It was a letter of October 18th and said,  
every other thing, "My own nourishment is completely different as to  
my happiness and when you say that I will never be happy if I take  
the food I am about to take, that of nourishment and being different  
from you, we can not say whether or not I will be happy. I only  
know that I want to be as alone, and I am willing to take any  
amount. I am not alone, but I am willing to take any  
nourishment, but I am not, for it is killing me now. And  
he will not come in the night or he will not interfere in  
physical matters." He has written to Mr. Bell, the wife,  
"I have told all our mutual friends that we have separated, and  
there will be no communication between us. It is decided, and it  
is not more difficult to have than to have since there is a divorce



can be secured than for one to agree to a divorce, and it can go through the court behind closed doors and no one need know." In another part of the same letter she said, "I cannot understand, Victor, why you want to try and win me back when you know so well I do not want to live with you but want to go my own way, and in so doing wish a divorce so that I may be free to do so." and again in the same letter she said, "If you will not agree to let me get a divorce, I shall have to go about it in my own way."

These letters and the pleadings in the case show that weeks before complainant had any knowledge that her husband had given her any grounds for divorce she was importuning him to allow her to obtain a divorce for temperamental reasons, indicating that the same could be obtained secretly in Chicago and urging defendant to consent thereto and to allow her father to adjust the matter with him. These facts and circumstances in our opinion indicate that complainant entertained but slight regard for her marital relations and failed to comprehend the nature of the marriage contract, and her belief that a divorce can be obtained secretly and behind closed doors. The testimony of complainant taken in connection with the pleadings in the case and the conclusions which naturally follow, seriously question the good faith of complainant in prosecuting the suit.

The allegations of defendant's answer as to his financial condition, which are not disputed by complainant, show that he has no income and that the payment of the alimony and solicitor's fees awarded must be made out of the principal of his estate. For this reason the allowance of alimony, if any, should be limited to the wife's actual necessities, as to which there is no evidence. Harding v. Harding, 144 Ill. 588. In our opinion, the trial court before awarding alimony and solicitor's fees should have required evidence showing good faith by complainant in prosecuting her suit and in view of defendant's financial condition, further



evidence as to complainant's actual necessities, which are not apparent from the record. For this reason, the present decree cannot be sustained. There is no evidence before us which would justify an attempt on our part to modify the terms of the decree.

The decree of the Circuit Court is reversed and the case remanded, but without prejudice to complainant, to renew her petition for temporary alimony and solicitor's fees, the allowance or refusal of which should be determined in accordance with the views above indicated.

REVEREND AND HONORABLE.

Barnes, P. J., and Gridley, J., concur.

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was not a participant in either the 1961 or 1962 study.

and that a 'revelation' was possible which would not require any

... ..

1. The first step is to identify the problem or question that needs to be answered.

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JAMES C. DAVIS, Federal Agent  
Director General of Railroads,  
Appellant,

vs.

G. W. BARNES,

Appellee.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

229 I.A. 635

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The Director General of Railroads brought suit in the Municipal Court of Chicago to recover from defendant certain freight charges amounting to \$36 and certain demurrage amounting to \$390 upon a carload of sawdust which he transported for defendant from Belleville, Ohio, to Cleveland, Ohio, over the Pennsylvania railroad under a bill of lading by which the merchandise was consigned to defendant in care of Cleveland Galvanizing Works at Cleveland, Ohio. The amount of the charges was computed correctly in conformity with the tariff and rules and regulations established by the Interstate Commerce Commission. At the close of all the testimony, the court instructed the jury to return a verdict in favor of defendant and against plaintiff upon the ground that there had been no performance of the contract by plaintiff. Judgment was entered upon the verdict, from which plaintiff has appealed.

Defendant's affidavit of merits was based upon the theory that he had paid the lawful freight charges by having on deposit with the N. Y. C. & St. L. R. R. Co. in Cleveland a check for \$35, which he had made on July 10, 1918, assuming that the merchandise would be transported by that road, and by the subsequent deposit with the agent of the Pennsylvania Railroad Company at Cleveland, on or about July 26, 1918, of a

Group 1000, 1100, 1200, 1300, 1400, 1500, 1600, 1700, 1800, 1900, 2000, 2100, 2200, 2300, 2400, 2500, 2600, 2700, 2800, 2900, 3000, 3100, 3200, 3300, 3400, 3500, 3600, 3700, 3800, 3900, 4000, 4100, 4200, 4300, 4400, 4500, 4600, 4700, 4800, 4900, 5000, 5100, 5200, 5300, 5400, 5500, 5600, 5700, 5800, 5900, 6000, 6100, 6200, 6300, 6400, 6500, 6600, 6700, 6800, 6900, 7000, 7100, 7200, 7300, 7400, 7500, 7600, 7700, 7800, 7900, 8000, 8100, 8200, 8300, 8400, 8500, 8600, 8700, 8800, 8900, 9000, 9100, 9200, 9300, 9400, 9500, 9600, 9700, 9800, 9900, 10000, 10100, 10200, 10300, 10400, 10500, 10600, 10700, 10800, 10900, 11000, 11100, 11200, 11300, 11400, 11500, 11600, 11700, 11800, 11900, 12000, 12100, 12200, 12300, 12400, 12500, 12600, 12700, 12800, 12900, 13000, 13100, 13200, 13300, 13400, 13500, 13600, 13700, 13800, 13900, 14000, 14100, 14200, 14300, 14400, 14500, 14600, 14700, 14800, 14900, 15000, 15100, 15200, 15300, 15400, 15500, 15600, 15700, 15800, 15900, 16000, 16100, 16200, 16300, 16400, 16500, 16600, 16700, 16800, 16900, 17000, 17100, 17200, 17300, 17400, 17500, 17600, 17700, 17800, 17900, 18000, 18100, 18200, 18300, 18400, 18500, 18600, 18700, 18800, 18900, 19000, 19100, 19200, 19300, 19400, 19500, 19600, 19700, 19800, 19900, 20000, 20100, 20200, 20300, 20400, 20500, 20600, 20700, 20800, 20900, 21000, 21100, 21200, 21300, 21400, 21500, 21600, 21700, 21800, 21900, 22000, 22100, 22200, 22300, 22400, 22500, 22600, 22700, 22800, 22900, 23000, 23100, 23200, 23300, 23400, 23500, 23600, 23700, 23800, 23900, 24000, 24100, 24200, 24300, 24400, 24500, 24600, 24700, 24800, 24900, 25000, 25100, 25200, 25300, 25400, 25500, 25600, 25700, 25800, 25900, 26000, 26100, 26200, 26300, 26400, 26500, 26600, 26700, 26800, 26900, 27000, 27100, 27200, 27300, 27400, 27500, 27600, 27700, 27800, 27900, 28000, 28100, 28200, 28300, 28400, 28500, 28600, 28700, 28800, 28900, 29000, 29100, 29200, 29300, 29400, 29500, 29600, 29700, 29800, 29900, 30000, 30100, 30200, 30300, 30400, 30500, 30600, 30700, 30800, 30900, 31000, 31100, 31200, 31300, 31400, 31500, 31600, 31700, 31800, 31900, 32000, 32100, 32200, 32300, 32400, 32500, 32600, 32700, 32800, 32900, 33000, 33100, 33200, 33300, 33400, 33500, 33600, 33700, 33800, 33900, 34000, 34100, 34200, 34300, 34400, 34500, 34600, 34700, 34800, 34900, 35000, 35100, 35200, 35300, 35400, 35500, 35600, 35700, 35800, 35900, 36000, 36100, 36200, 36300, 36400, 36500, 36600, 36700, 36800, 36900, 37000, 37100, 37200, 37300, 37400, 37500, 37600, 37700, 37800, 37900, 38000, 38100, 38200, 38300, 38400, 38500, 38600, 38700, 38800, 38900, 39000, 39100, 39200, 39300, 39400, 39500, 39600, 39700, 39800, 39900, 40000, 40100, 40200, 40300, 40400, 40500, 40600, 40700, 40800, 40900, 41000, 41100, 41200, 41300, 41400, 41500, 41600, 41700, 41800, 41900, 42000, 42100, 42200, 42300, 42400, 42500, 42600, 42700, 42800, 42900, 43000, 43100, 43200, 43300, 43400, 43500, 43600, 43700, 43800, 43900, 44000, 44100, 44200, 44300, 44400, 44500, 44600, 44700, 44800, 44900, 45000, 45100, 45200, 45300, 45400, 45500, 45600, 45700, 45800, 45900, 46000, 46100, 46200, 46300, 46400, 46500, 46600, 46700, 46800, 46900, 47000, 47100, 47200, 47300, 47400, 47500, 47600, 47700, 47800, 47900, 48000, 48100, 48200, 48300, 48400, 48500, 48600, 48700, 48800, 48900, 49000, 49100, 49200, 49300, 49400, 49500, 49600, 49700, 49800, 49900, 50000, 50100, 50200, 50300, 50400, 50500, 50600, 50700, 50800, 50900, 51000, 51100, 51200, 51300, 51400, 51500, 51600, 51700, 51800, 51900, 52000, 52100, 52200, 52300, 52400, 52500, 52600, 52700, 52800, 52900, 53000, 53100, 53200, 53300, 53400, 53500, 53600, 53700, 53800, 53900, 54000, 54100, 54200, 54300, 54400, 54500, 54600, 54700, 54800, 54900, 55000, 55100, 55200, 55300, 55400, 55500, 55600, 55700, 55800, 55900, 56000, 56100, 56200, 56300, 56400, 56500, 56600, 56700, 56800, 56900, 57000, 57100, 57200, 57300, 57400, 57500, 57600, 57700, 57800, 57900, 58000, 58100, 58200, 58300, 58400, 58500, 58600, 58700, 58800, 58900, 59000, 59100, 59200, 59300, 59400, 59500, 59600, 59700, 59800, 59900, 60000, 60100, 60200, 60300, 60400, 60500, 60600, 607

100-443884-1

1000

660 J. L. O'Shea

1. The Director of the Bureau of the Census, Department of Commerce, is requested to prepare a report on the results of the 1950 Census of the United States, showing the distribution of the population by race and color, and by sex, and to submit the same to the President of the United States.

in 1950 upon a contract of purchase which he presented for  
defendant from Louisville, Ohio, to defendant, who, after the  
defendant's return to the United States, he sold the

AMERICAN TO HAVE AN INTEREST IN DOMESTIC AND FOREIGN  
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and which are regulated or controlled by the Federal Government.

and the fact that the Government has been so successful in its efforts to suppress the Communist Party, it is not surprising that the Government has been so successful in its efforts to suppress the Communist Party.

...the ... of ...

by the defendant himself. It is the duty of the defendant to  
 that the defendant would be prosecuted by this Court, and  
 a check for \$10, which he had made on July 14, 1961, according

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check for \$35 and a further deposit on or about July 31, 1918, with said agent of a check for \$19.50. The check deposited with the N. Y. C. & St. L. R. R. Co. manifestly cannot be regarded as payment for the services in question, which were rendered by another company, and the two checks deposited with the agent of the Pennsylvania Railroad Company constituted neither payment nor tender of payment, as they were for an aggregate amount much less than the amount actually due from defendant. Subsequently defendant stopped payment on these checks, so that plaintiff never received any benefit from them. Under these circumstances this defense was without merit and was properly ignored by the trial judge.

The evidence shows that the shipment was ordered by defendant on July 10, 1918, and the bill of lading was dated July 11, 1918. The freight arrived in Cleveland July 22, 1918. Plaintiff, as required by law, immediately notified defendant upon arrival of the car and requested payment of its charges, which was refused. There were continued demands and refusals until September 16, 1918, when the merchandise was sold by plaintiff for its charges, and \$50 realized from the sale. This amount was credited to defendant, leaving a balance of \$376 due to plaintiff. Upon the trial defendant admitted that he received notice of the arrival of the car at Cleveland as early as July 26, 1918. Defendant contended that it was plaintiff's duty to deliver the car at the sidetrack of the Cleveland Galvanizing Works before payment of freight charges became obligatory. No brief has been filed by appellee, and we assume that the trial judge adopted this view in holding that there had been no performance of the contract by plaintiff.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. He or she will usually interview the complainant and the accused, and will also review the evidence. The next step is to determine the facts of the case. This is done by the investigator who will usually interview the witnesses and will also review the evidence. The third step is to determine the law that applies to the case. This is done by the investigator who will usually consult with the prosecutor and will also review the evidence. The fourth step is to determine the outcome of the case. This is done by the investigator who will usually consult with the prosecutor and will also review the evidence. The fifth step is to determine the reasons for the outcome of the case. This is done by the investigator who will usually consult with the prosecutor and will also review the evidence. The sixth step is to determine the lessons learned from the case. This is done by the investigator who will usually consult with the prosecutor and will also review the evidence. The seventh step is to determine the recommendations for the future. This is done by the investigator who will usually consult with the prosecutor and will also review the evidence. The eighth step is to determine the conclusions of the investigation. This is done by the investigator who will usually consult with the prosecutor and will also review the evidence. The ninth step is to determine the final report of the investigation. This is done by the investigator who will usually consult with the prosecutor and will also review the evidence. The tenth step is to determine the final outcome of the case. This is done by the investigator who will usually consult with the prosecutor and will also review the evidence.

[illegible]



We are of the opinion that the trial judge erred in holding that plaintiff had failed to perform its contract and in instructing the jury to return a verdict in favor of defendant. A carrier is not required to place a carload of freight upon a private track not in its possession or control until its lawful charges have been paid. Columbus Southern Ry. Co. v. Suffolk Co., 94 Ga., 507; Brooks Mfg. Co. v. Southern Ry. Co., 152 N. C. 666; Gulf Compress Co. v. Alabama Great Southern Ry. Co., 100 Miss., 583. The common carrier has a right to retain freight in its possession until its charges are paid or tendered and demand made for the property. G. & M. Ry. Co. v. Soc., 77 Ill. 513; Schumacher v. G. & M. Ry. Co., 108 Ill. App. 520.

Accordingly, the judgment of the Municipal Court is reversed and the case remanded.

REVERSED AND REMANDED.

Barnes, F. J., and Gridley, J., concur.

It was the opinion of the Board that the  
 building was situated in a place of some  
 importance and that it was well situated  
 for the purpose of the business of the  
 Board. The Board also considered the  
 fact that the building was situated in a  
 place of some importance and that it was  
 well situated for the purpose of the  
 business of the Board. The Board also  
 considered the fact that the building was  
 situated in a place of some importance  
 and that it was well situated for the  
 purpose of the business of the Board.

Respectfully,  
 Secretary of the Board

Very truly yours,  
 Secretary of the Board

Witness my hand and seal this 1st day of  
 January, 1911.

159 - 27994

CHRIST KARAGINAS,  
Appellee,

vs.

JOHN E. FRENCH,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

229 I.A. 636

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago entered July 8, 1922, for \$100 in favor of appellee. There was a jury trial. Appellant contends that the verdict and judgment were contrary to the manifest weight of the evidence; that the trial judge erred in his instructions to the jury and in his rulings upon evidence, and that his remarks and conduct in the presence of the jury were prejudicial to defendant to such an extent as to constitute reversible error. No brief has been filed by appellee.

While the record shows that defendant excepted to the instructions which were given orally, his objections were not specific and did not point out the portion objected to. A general objection is insufficient. Pecararo v. Halberg, 346 Ill. 95. We have examined these instructions and find that as a whole they fairly state the law applicable to the case.

The evidence shows that plaintiff on February 14, 1922, became the lessee of a certain store at 4443 Broadway, Chicago. At that time plaintiff agreed to purchase the fixtures in the store from defendant for \$750 and paid to defendant \$100 on account, with the agreement, as he testified, that the fixtures would be delivered on the following day. They were not so delivered. Subsequently, upon learning that the fixtures were subject to

Q. Now, did you see the man who was with the woman?

A. Yes, I saw him.

Q. What time did you see him?

A. I saw him at about 11:30 p.m.

Q. Did you see him again after that?

A. Yes, I saw him again.

Q. What time did you see him again?

A. I saw him again at about 12:30 a.m.

Q. Did you see him again after that?

A. Yes, I saw him again.

Q. What time did you see him again?

A. I saw him again at about 1:30 a.m.

Q. Did you see him again after that?

A. Yes, I saw him again.

Q. What time did you see him again?

A. I saw him again at about 2:30 a.m.

Q. Did you see him again after that?

A. Yes, I saw him again.

Q. What time did you see him again?

A. I saw him again at about 3:30 a.m.

Q. Did you see him again after that?

A. Yes, I saw him again.

Q. What time did you see him again?

A. I saw him again at about 4:30 a.m.



an outstanding chattel mortgage; that various persons claimed an interest in portions of them and that defendant could not deliver the fixtures as agreed, plaintiff elected to rescind his agreement to purchase and demand the return of the money paid on account.

Defendant contends that the existence of the chattel mortgage was made known to plaintiff at the time of the purchase and that the latter purchased the fixtures upon the understanding that defendant would acquire title by a foreclosure of the chattel mortgage, which would require a delay of several days. This view of the transaction is not sustained by the written memorandum which defendant gave to plaintiff at the time.

The jury evidently accepted plaintiff's version of the agreement between the parties and considered that plaintiff was entitled to have the fixtures delivered to him within the time and upon the terms that plaintiff testified were agreed upon. There is sufficient evidence in the record to sustain this view of the transaction, and therefore we cannot say that the verdict and judgment were contrary to the manifest weight of the evidence. For that reason the judgment will not be disturbed.

We have examined the record and find no reversible error in the rulings of the trial court upon questions of evidence and that the remarks and conduct of the trial judge in the presence of the jury were not prejudicial to defendant.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.



213 - 28048

LEONARD KOEBER,

Appellee.

vs.

SAINT PAUL FIRE AND MARINE  
INSURANCE COMPANY, of St.  
Paul, Minn., a corp.,  
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

229 I.A. 636

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in an action brought upon an automobile insurance policy issued by defendant, whereby it insured plaintiff against damages to his automobile resulting from accidental collision with any other automobile, vehicle or object. The case was heard by the court without a jury. There was a finding and judgment in favor of plaintiff for \$645, from which defendant has appealed. Plaintiff claims that his automobile was damaged by an accidental collision with another automobile on Roosevelt Road a short distance west of Wheaton, Illinois, July 9, 1921. Plaintiff's automobile was travelling in a westerly direction and the car with which it is alleged to have collided was going in the opposite direction. Defendant denied that there was any collision and refused payment of the claim. The occurrence of the accident and the amount of the damages to the automobile are undisputed.

Plaintiff and his brother-in-law, both of whom were occupants of the car at the time of the accident, the latter being the driver, testified that plaintiff's car was struck on the rear part of its left side by another automobile going in the opposite direction; that as a result of the collision the course of plaintiff's car was deflected so that it ran into the ditch on the left side of the road, where it was over-





turned. One of the witnesses for defendant who says that he saw the accident testified that he did not see any collision, but that plaintiff's car "turned across to the left hand and went into the ditch." The only explanation given by the witness for this unusual action was that if plaintiff's car had not turned as it did, it would have collided with another west-bound car ahead of it. This version of the accident seems improbable. Witnesses for both parties say that plaintiff's car had passed other cars going in the same direction without running into the ditch on the left of the road. There was no obstruction in the highway. The road was smooth. The driver of plaintiff's car was not shown to have been incompetent. No reason has been shown why he should deliberately have run his car into the ditch.

It is also claimed by defendant that plaintiff admitted there was no collision in a written statement of the accident offered in evidence by defendant. We have carefully examined this statement and find that it contains no such admission, although it does purport to give an explanation of the accident, which does not mention the collision. The written memorandum does not appear to give a full account of the accident, and makes no mention of the car coming in the opposite direction except to say that it did not stop. There is nothing in the statement which necessarily contradicts plaintiff's testimony on the trial. While we are not called upon to reconcile the conflicting statements in the record, it seems probable that plaintiff's car while passing another car going in the same direction was struck by a car going in the opposite direction, with the result that plaintiff's car ran into the ditch. At any rate, we cannot say that the finding

[illegible]

and judgment were contrary to the manifest weight of the evidence. For that reason the judgment will not be disturbed. It is unnecessary to cite authorities in support of this well established proposition.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

Содержание: 1. Общие сведения о предприятии. 2. Описание продукции. 3. Анализ рынка. 4. Оценка конкурентов. 5. Стратегия маркетинга. 6. Финансовый анализ. 7. Заключение.



222 - 28057

JOSEPH H. WHITE, Appellee,

vs.

LOUIS BREIBICH, Appellant.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

22914830

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Judgment by confession was entered by the Municipal Court of Chicago on August 9, 1922, in favor of appellee for \$175 under the terms of a lease from appellee to appellant dated December 25, 1921, for a term of five years at a rental of \$150 per month payable in advance. The judgment was for the rent due under the lease for the month of July, 1922, and \$25, plaintiff's attorney's fees.

On August 15, 1922, defendant, who is appellant here, presented his motion to vacate the judgment, accompanied by his affidavit setting forth his grounds of defence to the action, which were, in substance, that plaintiff had failed to furnish him with keys to the store, which included the demised premises; that he ordered defendant's customers from the premises; that he used insulting language to said customers and to defendant's wife and daughter; that plaintiff interfered with defendant's use of windows in the store for display purposes; that plaintiff lived in rooms above the store in question and kept these rooms in such a filthy condition that defendant was overrun with roaches and vermin migrating therefrom, thereby ruining defendant's merchandise and rendering it unsalable, and that these acts "constitute a technical, actual and constructive eviction" of defendant "from the conduct of the business contemplated in the lease." The motion to vacate the



judgment was denied and defendant has appealed from that order. No brief has been filed by appellee.

We have examined the lease between the parties by which plaintiff demised to defendant, for the term and rental above mentioned, a small space four feet wide and twelve and one-half feet long, "commencing eighteen feet from front of inside store window," to be used for selling, displaying and handling lingerie. The premises in question were part of a store at 4814 Broadway, Chicago. The lease contained sundry provisions whereby lessor and lessee agreed to share equally in the payment of certain overhead expenses incidental to the occupancy of the store by both parties, but provided that each of the parties was to conduct his business separately and independently of the other. The size of the entire store is not shown, but it is to be inferred that lessee occupied only a small portion of the premises and that the major part of the store was to be occupied by the lessor for the purposes of his business, the nature of which is not shown. It appears from the document in question that plaintiff was in possession of the premises under a lease from one Chamalea and the lease involved herein contains numerous provisions for the protection of defendant in the event of any default by plaintiff in the payment of rent under the Chamalea lease. It contains some of the usual provisions for the protection of the lessor against subletting and other acts, and in case of non-payment of rent, confers the power to obtain judgment by confession for unpaid rent. It contains no provision requiring the lessor to give keys to the lessee or for use of the windows for display purposes. It does not appear from the record that defendant has been denied ingress to or egress from the demised premises at





any time. There seems to be nothing to prevent defendant from obtaining and using his own keys to the store. The other acts of plaintiff of which defendant complains do not constitute an eviction. When the acts of the landlord are such as merely tend to diminish the beneficial enjoyment of the premises, the tenant is still bound for the rent if he continues to occupy the premises. Keating v. Springer, 146 Ill. 495. As the affidavit filed in support of the motion to vacate the judgment did not state a meritorious defense, the trial court committed no error in denying the motion.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, E. J., and Gridley, J., concur.



223 - 28058

JOSEPH H. WHITE,

Appellee,

vs.

LOUIS FREIREICH,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MERRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court of Chicago denying the motion of defendant, who is appellant, to vacate a judgment by confession against him entered under the terms of a lease between the parties dated December 28, 1921. The judgment was for the agreed rental for the month of August, 1922, amounting to \$150 and \$25 plaintiff's attorney's fees.

We have considered and discussed the terms of this lease in our opinion filed this day in case number 28057, between the same parties, which was an appeal from an order of the Municipal Court denying a motion to vacate a judgment for the rent for the month of July, 1922, under the same lease.

The affidavit in support of the motion herein states the same grounds of defense to the action as that which was filed in the former case, and appears to be identical with it. Having held that this affidavit did not state a meritorious defense in the former case, it follows that the same ruling must be made in the present case. As the issues are the same in both cases, no further discussion of them is necessary.

The decree of the Municipal Court is affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

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*J. Chem. Phys.* **19**, 105 (1951); *ibid.* **20**, 1797 (1952).

U.S. GOVERNMENT PRINTING OFFICE: 1967 O 344-741

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

Related studies have reported mixed results in relation with company size.

1 August 1999 and 2000 are shown in Fig. 1. The 1999

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Journal of Management Education 32(10)

able to point out reasons for our existence and

*Journal of Management Studies* 20(1) 1997, pp. 111-121

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Source: (1) *Journal of the Royal Society of Medicine*, 1971, 64, 10; (2) *Journal of the Royal Society of Medicine*, 1971, 64, 10.

and the observed variation will be the same as the expected variation.

and (6) the results are consistent with the model. To illustrate, assume that

4. *Journal of the American Statistical Association*, 1991, 86, 103-110.

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100-124 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840.



HUGO WILKE,  
Appellee,

vs.

MERRILL, LYNCH & COMPANY,  
a corporation,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

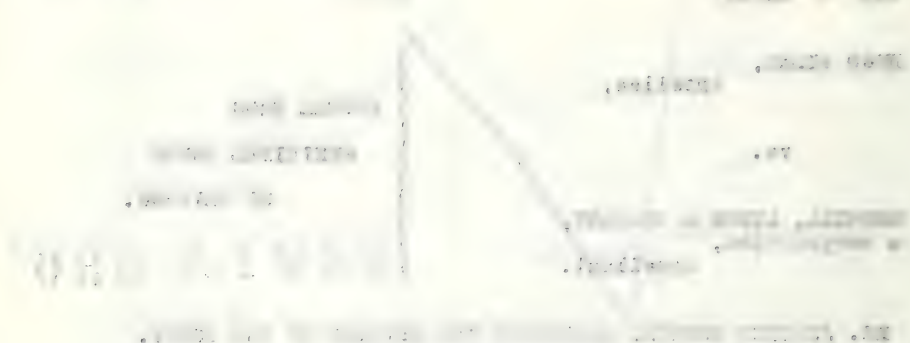
229 14-336

MR. JUSTICE HOWELL DELIVERED THE OPINION OF THE COURT.

Defendant, Merrill, Lynch & Company, a corporation, has appealed from a judgment of the Municipal Court of Chicago entered April 15, 1922, in favor of plaintiff for \$1,046.64 and costs. There was a jury trial and a verdict in favor of plaintiff, upon which judgment was entered.

The statement of claim alleged that plaintiff had an account with defendant for the purchase and sale of stocks, which was closed August 1, 1920, and upon which there was due to him \$986.23, which defendant refused to pay; that on April 28, 1920, defendant charged plaintiff's account with said sum of \$986.23, which had been transferred from the account of one Cruce to that of plaintiff without the consent or authority of plaintiff, and that Cruce was not the agent of plaintiff.

Defendant's affidavit of merits stated that it is in the brokerage business and that plaintiff carried an account with it and that from time to time it bought and sold various stocks and commodities on behalf of plaintiff; that the said Cruce was the attorney in fact of plaintiff, duly empowered by a written power of attorney executed by said plaintiff; that the balance mentioned in the statement of claim of \$986.23 was the balance remaining from certain trades



The diagram illustrates the relationship between the vertical line and the base of the triangle. The vertical line is perpendicular to the base, and the two slanted sides are of equal length. This configuration is characteristic of an isosceles triangle. The diagram is used to demonstrate the properties of such a triangle, specifically the equality of the base angles and the fact that the vertical line bisects the base and the top angle.

The diagram is a simple geometric representation of an isosceles triangle. The vertical line represents the altitude, which is also the median and the angle bisector. The base is the horizontal line at the bottom, and the two slanted lines represent the equal sides of the triangle. The labels 'Vertical Line', 'Base', and 'Slanted Sides' clearly identify the components of the diagram.

The diagram is a clear and concise way to show the properties of an isosceles triangle. It is a good example of how a simple diagram can be used to illustrate a complex geometric concept. The labels are well-placed and easy to read, and the diagram is well-proportioned and easy to understand.

The diagram is a good example of how a simple diagram can be used to illustrate a complex geometric concept. It is a good example of how a simple diagram can be used to illustrate a complex geometric concept. The labels are well-placed and easy to read, and the diagram is well-proportioned and easy to understand.

carried on for the account of plaintiff in the name of said Cuzcs by defendant, and that said balance by the direction and consent of plaintiff was, on or about April 28, 1920, transferred to plaintiff and a statement thereof sent to plaintiff; that all of defendant's transactions in connection with plaintiff's account, including the charging of plaintiff's account with said balance, were conducted with the full knowledge and consent of plaintiff.

The evidence on the part of plaintiff consists solely of his own testimony. He testified, in substance, that early in May, 1920, he called on defendant and had a conversation with its manager regarding the charge of \$986.23, to which he objected; that he was having negotiations with defendant on or about July 30, 1920; and that he had no other interviews with defendant until on or about August 2, 1920, when the charge of \$986.23 was discussed. Upon cross-examination he testified that there was never any interchange of stock transactions between the Cuzcs and plaintiff's account, but admitted the receipt of a statement of his account showing the transfer on January 28, 1920, of a certain fifty shares of stock from Cuzcs' account to his own account; also the receipt of another statement showing the transfer on February 26, 1920, of fifty other shares from the Cuzcs account to his own account, but he had no special recollection of them. He admitted receipt of plaintiff's statement of account, which he had offered in evidence, covering his transactions from March 1 to July 12, including the balance transferred from the Cuzcs account. He made various statements as to the date of the receipt of this account, but finally said that he could not say when he did receive it, although he admitted receiving it and noticing the charge. He also admitted receipt of statements of account on the





first of each month from November, 1919, to August, 1920, and that those from May to August, 1920, showed the transfer of the balance of the Cauce account amounting to \$86.25; that after May 1, 1920, he kept on trading with defendant, using his account and defendant's credit, and conducted his regular chain of operations, and that he had been told by his attorney to testify that the power of attorney mentioned in defendant's affidavit of merits contained no authority to make the transfer complained of.

The record further shows that the power of attorney in question was in the form of a letter which gave to Cauce very broad powers to manage plaintiff's account, and among other things, in substance, ratified and confirmed all orders now or hereafter given by him. The evidence establishes conclusively the mailing of monthly accounts from defendant to plaintiff, all of which, after May, 1920, and up to August, 1920, showed the transfer of the Cauce balance to defendant's account. There was evidence in the record tending to show that plaintiff and Cauce were jointly interested in the account carried in the name of Cauce, having equal shares therein. While plaintiff upon rebuttal denied that he directed the transfer of the balance due on the Cauce account to his own account, he does not deny that he had an interest in the Cauce account. In July, 1920, defendant notified plaintiff that it desired him to close his account. Plaintiff did not object to doing so, but delayed on account of negotiations which he claimed to be having for the purpose of obtaining a loan with which to pay the balance of \$10,477.58 then due defendant. This loan apparently was not obtained, and at the end of August defendant sold securities deposited with it by plaintiff to an amount sufficient to reimburse it for the indebtedness due it, and mailed a complete statement of all of its transactions to defendant, accompanied by a check for the balance then due to defendant from the proceeds

First of each month from January, 1914, to March, 1915, and  
that these amounts are correct, and that the balance of the  
balance of the same account amounted to \$100.00; that during

May 1, 1915, he kept on working with the defendant, until the defendant  
and defendant's family, and requested his personal check of

agreement, and that he has been paid by the attorney in writing  
that the work of attorney consisted in defendant's affidavit of  
marital status as to whether he was the father or mother of

The record further shows that the work of attorney

in question was in the form of a letter which gave to him a very  
small sum of money, which defendant's attorney, and which were taken

in payment, verified and confirmed all other and no other  
given by him. The evidence established conclusively the validity  
of marital status from record in plaintiff's affidavit, all of which,

after May 1, 1915, and up to March, 1915, which the plaintiff  
the same balance to defendant's account. There was evidence in  
the record showing to show that plaintiff and defendant were jointly

interested in the account which in the name of Thomas, having

equal share therein. This plaintiff upon plaintiff's record that  
he directed the transfer of the balance due on the same account  
to his own account, in fact and that he had no interest in

the same account. In fact, plaintiff testified plaintiff  
that it was his duty to take the account. Plaintiff did not see  
any of the money, and was obliged to transfer it to plaintiff which in

effect to be having the same purpose of obtaining a loan with which  
to pay the balance of \$100.00 from the defendant. This loan

agreement was not valid, and it was not a loan between them

as between plaintiff and defendant, but it was a loan between

as between plaintiff and defendant, but it was a loan between

as between plaintiff and defendant, but it was a loan between

of the sale of his securities. This check was accepted and cashed by defendant.

Under these circumstances, we think that there was an account stated between the parties, in which plaintiff acquiesced and the benefits of which he accepted. He accepted the check which accompanied the final statement of account on August 7, 1920. This check was undoubtedly given in full settlement of all transactions between the parties. Clearly it was so offered by defendant. Plaintiff could not have understood otherwise. He accepted and cashed the check with the full knowledge that in so doing he was acknowledging full settlement of the account as stated. He further confirmed the settlement by accepting the balance of the securities deposited with defendant without complaint or criticism. Plaintiff had a right to accept the check upon the terms offered or to reject it, but did not have the privilege of making a new contract for defendant by accepting the amount offered in full settlement and afterwards claiming that the settlement was partial only. Strander v. Scott, 161 Ill. 359; Ganton Union Co. v. Parlin, 215 Ill. 214; Ray v. Griesheimer, 230 id. 106; Laps v. Smith, 186 id. 172. The fact that the settlement was made on an improper basis or that plaintiff received thereby less than he was entitled to receive, and his lack of information as to the law governing settlements, were not sufficient reasons for disregarding a settlement made with the full knowledge of the facts. Janci v. Carney, 257 Ill. 359. These principles have been accepted and uniformly enforced by numerous decisions of the appellate courts of this state in different districts. Ray-Mellwitz Lumber Co. v. Carroll, 177 Ill. App. 30; Bennett v. Hudson, 174 id. 339; North Maskey Coal Co. v. Parker-Washington Co., 157 Ill. App. 109; Black-Glasson Co. v. Carlyle Paper Co., 133 id. 61.



of the sale of the property. This check was received and

deposited in the bank.

After the receipt of the check, the bank advised me

on several times during the period, in which I was

employed and the property was being sold, that the

bank which was handling the sale of the property was

located in New York City, and that the bank was

located at 111 Broadway, New York City, New York.

It was also stated by the bank that the bank was

located at 111 Broadway, New York City, New York.

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Page 10, 11, 12.



Plaintiff contends that defendant's affidavit of merits did not justify it in relying upon the defense of an account stated. We think that the allegations of the affidavit of merits were sufficiently broad to notify plaintiff that this defense was available to defendant. Various other grounds of reversal are urged in appellant's brief, which we do not deem it necessary to discuss.

The judgment of the Municipal Court was contrary to the law and the manifest weight of the evidence. Accordingly it will be reversed with a finding of facts and judgment for defendant entered here.

REVERSED WITH FINDING OF FACTS  
AND JUDGMENT HERE.

Barnes, S. J., and Gridley, J., concur.



232 - 28067

FINDING OF FACTS.

The court finds as ultimate facts in this case that there was an account stated between the parties in which plaintiff acquiesced and that plaintiff accepted and retained the balance shown to be due him by said account stated.

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE



CHARLES A. STRAND.

Appellee.

vs.

ERIC J. STRAND.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in favor of plaintiff, who is appellee, for \$172.50. The trial was before the court without a jury. Plaintiff's claim was for money had and received.

The bill of exceptions shows that defendant, who is appellant here, admitted the debt but filed a claim of set-off amounting to \$239. The court refused to hear evidence in support of the claim of set-off and entered judgment in favor of plaintiff, from which defendant has appealed. Appellee contends that defendant abandoned his claim of set-off and relies upon an order of court granting leave to defendant "to withdraw set-off from the files." A withdrawal of the claim from the files does not necessarily mean an abandonment or waiver of the claim. Its physical withdrawal from the files may have been for temporary purposes.

Under section 47 of the Practice Act, the defendant is given the absolute right to plead or give notice of set-off, which is a mode of defense and a species of plea in bar. The obligation on the part of a court to hear evidence in support of a claim of set-off is the same as that which requires the hearing of evidence in support of plaintiff's claim. Defendant cannot be deprived of his rights by the refusal of the court to hear evidence in support of his counter-claim.

CHURCHILL & CO.

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This is an appeal from a judgment of the court of appeals in favor of appellant, who is assigned, for

117. The trial was before the court without a jury.

118. The claim was for money due and received.

The bill of exceptions shows that appellant, who

is appellant here, admitted she had filed a claim of

119. The court refused to hear evidence

in support of the claim of appellant and refused judgment in

favor of appellant, even when it was shown that

120. Appellant contends that appellant admitted the claim of

121. and paid upon an order of court directing her to

122. "as of course" from the claim. A witness

of the claim from the first does not necessarily mean an

123. statement or report of the claim. The physical statement

from the claim may have been for temporary purposes.

124. A witness of the claim is not the statement

is given the absolute right to give an order of appeal,

which is a matter of law and a question of fact. The

125. on the part of a court in such evidence in support

of a claim of appeal is not the same as that which requires the

126. of evidence in support of appellant's claim. Appellant

cannot be required to file a claim of appeal in the court

in such evidence in support of the claim.

The judgment of the Municipal Court is reversed  
and the case remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

Account of small incidents will be treated as follows:

1. Accounts of small incidents will be treated as follows:

2. Accounts of small incidents will be treated as follows:

3. Accounts of small incidents will be treated as follows:



271 - 28106

NORMAN E. LEMMON and RAYMOND  
N. LEMMON,

Appellees,

v.

J. GRAY LUCAS,

Appellant.

APPEAL FROM COUNTY COURT  
OF COOK COUNTY.

229 T. A. 627<sup>1</sup>

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the County Court of Cook County in an action of replevin to recover possession of a certain storage battery.

The record shows that the battery in question was taken from defendant by the sheriff under a replevin writ and restored to plaintiffs, so that the only question before the court upon the trial was, whether or not plaintiffs were entitled to the possession of the property at the time the action was commenced. A jury was waived and the case submitted to the court, who found the right of property in plaintiffs and entered judgment accordingly.

The evidence shows that the battery in question was sold by plaintiffs to defendant March 19, 1921. The terms of the sale were embodied in a written instrument signed by both parties, from which it appears that the price agreed to be paid for the battery was \$400, of which \$100 was paid at the time of delivery and the balance was payable in three monthly payments of \$100 each for which defendant gave his judgment notes. The instrument provided that the battery was to remain the property of the vander and not <sup>to</sup> be transferred or assigned until final payment was made. Defendant made default in the payment of the first of the notes given for the purchase price.

By certain special pleas defendant sought to

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establish as defenses that the battery did not comply with a certain alleged guarantee as to the condition of the battery after it had been operated for a period of twenty-four months from the date of the sale or "for 10,000 miles," and that plaintiffs had failed to return the payment made to them on the purchase price before commencing suit. The court properly sustained demurrers to these pleas and a reversal is sought on account of that ruling.

The alleged guaranty was not available as a defense in a suit brought to recover possession of the property in question. The other alleged ground of defense is equally untenable. The sale was conditional and the battery remained the property of the vendor until paid for, as shown by one of the pleas to which the demurrer was sustained. Plaintiffs were therefore entitled to recover their property upon default being made by the purchaser upon their payments, and were under no obligation to tender to defendant the amount which had been paid by him.

Latham v. Sumner, 69 Ill. 223; Fairbanks v. Haller, 16 Ill. App. 277. The case cited by appellant purporting to be to the contrary applies to an absolute and not to <sup>e</sup>conditional sale. It is unnecessary to discuss other questions argued by counsel in their respective briefs.

The judgment of the County Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

At present the Bureau will be able to do more than to provide information to the public. It will be able to provide information to the public in a more complete and more accurate manner than it has in the past. It will be able to provide information to the public in a more complete and more accurate manner than it has in the past.

under the name of the person who gave the information. The person who gave the information should be identified as the source of the information.

1. The first group of people who were arrested in the early 1950s were those who were active in the Communist Party of the United States (CPUSA). These people were arrested because they were considered to be a threat to the national security of the United States.

THE UNIVERSITY OF CHICAGO PRESS

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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11.  $\frac{1}{2}$  of the total number of students are female.

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THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

vs.

ALMA CUSICK and HARRY CUSAK,  
Plaintiffs in Error.

3006a  
ERROR TO CRIMINAL COURT  
OF COOK COUNTY.

229 I.A. 637

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Upon trial by the court defendants were found guilty of the crime of pandering and sentenced to the House of Correction for one year and fined \$1,000. They seek a reversal of the judgment.

The indictment charged, in three counts, that Alma Cusick, Harry Cusak and Joseph Costa did unlawfully and knowingly place Minnie Gehlerking as an inmate in a house of prostitution and did unlawfully and knowingly take some of money from her which were part of her earnings from the practice of prostitution, the defendants knowing that the money was part of such earnings, and unlawfully and knowingly did cause, induce and persuade Minnie Gehlerking to become an inmate of a house of prostitution. Costa was not apprehended. The other defendants pleaded not guilty and waived a trial by jury.

The complaining witness, Minnie Gehlerking, testified that she was taken by Costa to the Roamer Inn in Pecon, Cook County, Illinois, a "roadhouse;" that as they neared the place she was told by Costa it was a house of prostitution; that when she objected to going there she was told that she would go as a maid to do housework and would have nothing to do with men. At the Inn she had a conversation with the defendant Harry Cusak, who told her the character of the place. She was put in charge of the housekeeper, and after she had changed her clothes she talked

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with the defendant Alma Cusick, who, after asserting that she was "a new girl here," told her that she would "have some of the other girls tell you how to get along," that she should try to get as much money from the men as possible, and that she, the complaining witness, was to make half of what she took from the men and the house was to get the other half. Defendant Alma Cusick also gave her instructions how to protect herself from venereal diseases. The evidence shows there were a number of other girls at the place at the time, and that she and they paid money which they received from men to Alma Cusick; that she would give the girls a check which the girls would afterwards exchange for cash.

After Minnie Oehlerking had been in the place about three weeks she was found by her father, who called at the house with a constable to take her away. He then had a conversation with defendant Harry Cuzak, who asked him what he would take to settle the case. The father refused to entertain the offer of settlement.

Defendants did not take the stand to testify and no evidence in defence was offered. The evidence above referred to, together with other circumstances and details, abundantly proved that defendants were guilty as charged.

It is argued that the date of the offense is not shown and that the statutory period of limitation may have run before prosecution was commenced. The record shows that the trial was on February 17, 1922. Minnie Oehlerking testified that she was then eighteen years of age. She also testified that when she entered the Roamer Inn she was eighteen years of age. The offense must therefore have been within a year before the trial. The date of an offense is sufficiently proven if it is made clear from any evidence upon the trial. The People v. Fitzgerald, 297 Ill. 264.





It was not necessarily reversible error to permit the prosecuting witness to relate what was said to her by the housekeeper out of the presence of defendants. The case was tried by the court, and what the housekeeper said as to the place was abundantly proven by other testimony.

The State's attorney attempted to offer in evidence a record of a former conviction, but objection to this was sustained. To convict defendants of a felony, a former conviction should have been charged in the indictment. The indictment charges only a single offense, a misdemeanor, and defendants had the right to waive a trial by jury and submit the case to the court. The fact that defendants might have been indicted for a felony does not affect the validity of the conviction for a misdemeanor. The People v. Boykin, 298 Ill. 11.

Criticism is made of the alleged vagueness and uncertainty of the statute against pandering. The Boykin case, supra, has decided that this statute is constitutional.

It is said that defendants were represented upon the trial by counsel other than those appearing in this court, and that their interests were not properly protected, and that the defense was not conducted skilfully. We find nothing to justify this assertion. Defendants' counsel upon the trial is a well known member of this bar and at one time was an assistant State's attorney of this county. His reputation and experience negative any assertion that the interests of the defendants were not properly cared for.

Upon the record the guilt of the defendants was so clearly proven, with no contradictory facts presented, that irregularities upon the trial would not justify a reversal. The judgment therefore is affirmed.

AFFIRMED.

Matchett, J., concurs.

It was not necessarily necessary to prove to the

the government's claim to the land in the year 1860

possessors of the land in the year 1860. The land was

owned by the state, and the government's claim to the

land was established by other evidence.

The state's attorney admitted to the fact in evidence

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THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error.

vs.

MISS MADICK,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

MR. PRESIDING JUSTICE KESSELY  
DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks the reversal of a judgment finding him guilty of wrongfully having in his possession intoxicating liquors containing more than one-half of one per cent of alcohol, in violation of the Illinois Prohibition Act, chapter 43.

It is first assigned as error that a plea of guilty was taken without the court first advising defendant as to the consequences of said plea. There is irregularity in the record, which shows that when arraigned defendant pleaded not guilty, but that the cause came for trial "on the plea of guilty." Assuming that a plea of guilty was entered, it was the duty of the trial court, before the plea was entered, fully to advise defendant of his rights and the consequences of his plea. Arceles v. People, 224 Ill. 456. The failure so to advise the defendant requires a reversal.

The statute provides that punishment for this act shall be, for a first offense, a fine "or" imprisonment. The defendant here was both fined and sentenced to imprisonment. This was improper.

For the reasons above indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, J., concurs.



It is the duty of every individual to be prepared at a moment's notice to be ready to go to work at a moment's notice. It is the duty of every individual to be prepared at a moment's notice to be ready to go to work at a moment's notice. It is the duty of every individual to be prepared at a moment's notice to be ready to go to work at a moment's notice.

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NIEDERMAN FURNITURE AND CARPET  
COMPANY, a Corporation,

Appellee,

vs.

CHARLES SCHULLER,

Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

220 I.A. 6873

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

In an action, tried by the court, for balance due for merchandise sold and delivered by plaintiff to defendant, plaintiff had judgment for \$245, from which defendant appeals.

The brief for defendant is arranged so contrary to the requirements of rule 19 of this court as to make it difficult to determine what points are presented as grounds for reversal.

We gather, however, that the defense claimed is that there was another furniture store by the name of "Redner & Niederman Furniture Company," and that defendant's wife intended to purchase furniture from this company rather than from plaintiff, the Niederman Furniture & Carpet Company. It is claimed that there was some misrepresentation by some one in plaintiff's store which deceived her into thinking she was dealing with the Redner & Niederman Furniture Company instead of with plaintiff. The evidence as to this is not convincing.

When plaintiff attempted to deliver the furniture to defendant's residence his wife at first refused to accept it, apparently having discovered that she had not bought from the store she <sup>had</sup> intended. Plaintiff's driver and the helper offered to take the furniture back, but she then changed her mind and permitted all the furniture to be delivered at defendant's residence and executed a receipt therefor. Having accepted and received



the goods defendant was bound to pay for them.

Upon the trial certain documents were introduced in evidence, namely, the receipt for the furniture and also a chattel mortgage which apparently would tend to prove that defendant claimed to own the furniture, but these documents are not included in the bill of exceptions. We must therefore assume they contained sufficient evidence to justify the finding of the court.

Apparently some complaint is made that the court did not make a sufficiently clear finding to warrant the entry of judgment. This point is without merit, for the record shows that the court properly found against defendant and assessed plaintiff's damages at the amount for which judgment was entered.

The judgment is affirmed.

AFFIRMED.

Ketchett, J., concurs.

*Journal of Management Studies*, 19(6), 701-718.

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is active in the United States or whether it is merely a propaganda organization.

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134 - 27968

SAM MINDEL,  
Appellee,  
vs.  
LOUIS ZUCKERMAN,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

MR. PRESIDING JUSTICE MCSURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit as the holder of a check signed by defendant, payable to the order of Sam Tavalin and by him endorsed and delivered for value to plaintiff. Upon trial by the court judgment was entered against defendant for \$229, the face of the check. The defense was that the check was given by defendant to the payee, Tavalin, in settlement of defendant's losses incurred in gambling by playing the game commonly known as poker; that Mindel, the plaintiff, was a party to the game and knew that the check was given in payment of a gambling transaction and therefore said check was void and of no effect under the statute. Criminal Code, chap. 38, section 309, Illinois Statute, Cahill.

We are of the opinion the record fully sustains the defense pleaded and that the finding of the court should have been for defendant. Defendant testified that on the occasion in question the plaintiff, Tavalin, a party named Maggott, and the defendant were playing stud poker in the basement of premises owned by a Mr. Schrisber; that Tavalin was the "banker;" that the check was drawn by defendant and given to Tavalin in payment of what he was supposed to have lost at the game; that defendant then said in the presence of plaintiff that he thought he had been "used unfairly" and was forced to give the check, but that that "wasn't the last of it." Plaintiff says that he cashed the check for Tavalin and deposited



it, but that defendant had ordered payment stopped.

Evidently this basement was frequently used by these same parties for playing card games for money. It clearly appears that the parties named, including the plaintiff, were playing poker for money upon this particular evening. The attempt by plaintiff and the other parties in the game to make it appear that they did not know what was going on, or the purpose for which defendant gave the check to Tavalin, the banker, is too childish to require discussion. They were evidently experienced in games of this kind and well knew what was going on.

We are inclined to think that the trial court was moved to find against defendant by the feeling that it would have been more sportsmanlike for him to stand his losses. However this may have been, the statute fits just such<sup>a</sup> case as this, and the defense was amply proven. It follows, therefore, that the judgment of the Municipal court should be reversed and, as there can be no recovery, judgment of nil capiat is entered in this court.

REVERSED WITH JUDGMENT OF NIL CAPIAT.

Matchett, J., concurs.

11. The first defendant had several previous arrests.

12. The second defendant was previously married to a woman

and was living with her at the time of the offence. It is stated that the defendant was living with her at the time of the offence.

13. The third defendant was living with her at the time of the offence.

14. The fourth defendant was living with her at the time of the offence.

15. The fifth defendant was living with her at the time of the offence.

16. The sixth defendant was living with her at the time of the offence.

17. The seventh defendant was living with her at the time of the offence.

18. The eighth defendant was living with her at the time of the offence.

19. The ninth defendant was living with her at the time of the offence.

20. The tenth defendant was living with her at the time of the offence.

21. The eleventh defendant was living with her at the time of the offence.

22. The twelfth defendant was living with her at the time of the offence.

23. The thirteenth defendant was living with her at the time of the offence.



IGNATZ C. HODOUS and VACLAV  
CARTER,

Appellees,

vs.

ANTON F. PROCHASKA,

Appellant.

APPEAL FROM CIRCUIT COURT OF  
COOK COUNTY.

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

This is a mandamus proceeding wherein defendant was ordered to produce for inspection of complainants the books of the Cicero Dairy Company. Defendant seeks to have this order reversed.

By the petition complainants alleged that they were the owners of ninety-nine shares of the capital stock of the Cicero Dairy Company, a corporation organized under the laws of the State of Illinois, operating its dairy business in Cook County; that defendant owns 1,054  $\frac{2}{7}$  shares of the stock and is the president and in full charge of the business affairs and the property of the company; that he has possession of the books and records; that he is acting, with certain other persons who claim to be directors, with hostility towards complainants and refuses to give them access to the books; that a written notice was served upon defendant individually and as president and director of the Cicero Dairy Co., demanding on behalf of the complainants as stockholders the production of the books of account and stock transfer book and other books of this company for the purpose of inspection, pursuant to the rights and privileges of the stockholders under the laws of Illinois with reference thereto; that the purpose of this demand was to ascertain whether the affairs of the company were being fairly, honestly and economically administered in the interests of its stockholders and that they have no interest adverse to those of the corporation.

THE UNITED STATES OF AMERICA

DEPARTMENT OF COMMERCE

WASHINGTON, D. C.

OFFICE OF THE SECRETARY OF COMMERCE

THIS IS A COPY OF THE REPORT OF THE

COMMISSIONER OF THE GENERAL INVESTIGATING BOARD OF THE DEPARTMENT OF COMMERCE, DATED JANUARY 1, 1900.

THE REPORT IS HEREBY SUBMITTED TO THE SECRETARY OF COMMERCE.

THE COMMISSIONER OF THE GENERAL INVESTIGATING BOARD OF THE DEPARTMENT OF COMMERCE, DATED JANUARY 1, 1900.

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THE COMMISSIONER OF THE GENERAL INVESTIGATING BOARD OF THE DEPARTMENT OF COMMERCE, DATED JANUARY 1, 1900.

THE COMMISSIONER OF THE GENERAL INVESTIGATING BOARD OF THE DEPARTMENT OF COMMERCE, DATED JANUARY 1, 1900.

The petitioners charged the fact to be that the action of the defendant in refusing to permit petitioners to examine the books and papers of the corporation is for the purpose of concealing from the petitioners some illegal act on his part or to harass and oppress the petitioners in their rights as stockholders and likewise to jeopardize their financial interest in said corporation and to deprive them of their rights and powers as directors and officers of the company. Petitioners allege that the refusal of the defendant to give them access to the books and to inspect and examine them is in violation of the statute.

Defendant filed a demurrer to this petition, which on hearing was overruled and an order entered that defendant answer within ten days. Defendant elected to stand upon his demurrer, whereupon judgment was entered against him by default for his failure to answer, and the writ of mandamus was issued.

The points made in defendant's brief in this court relate to the practice in mandamus proceedings. There is no question but that a petition for mandamus must show on its face a clear right to the relief demanded, and facts will not be presumed. All the points made in defendant's brief may be conceded as correct statements of the law.

The rights of stockholders to inspect books of a corporation are fixed by statute. Chapter 32 on Corporations, sections 37 and 38. This right has been exercised and upheld so repeatedly that no further comment is necessary. Stone v. Kellogg, 165 Ill. 192.

The objections made before us lack substance. It is said that the statute does not give a stockholder right to compel a corporation to open its stock transfer book to his attorney. Whether or not this is true is not relevant, for neither the petition nor the mandamus writ refers to complainant's attorney.





The mere fact that in the written notice of complainants to defendant their attorney's name was mentioned is not important.

Neither is it of any moment that this demand for access to the books did not specify time and place. Rights of parties are under the writ and the statute regulates the time.

It is not necessary to state whether the defendant held the books individually or as president and director. The petition asserts that he had possession of them and refused to give petitioners access to them; also that he was in full charge of the business and property. This is sufficient.

It is not necessary that the secretary and treasurer should be made parties defendant, but if so, the omission cannot be taken advantage of by a demurrer without averring therein the want of proper parties. Portones v. Badnock, 132 Ill. 377.

We have noted other points, but they also are without merit.

Petitioners made out a clear case of right to the writ, and the judgment awarding it is affirmed.

AFFIRMED.

Matchett, J., concurs.

The mere fact that in the United States of America the  
United States Attorney's name was mentioned is not important.

Belated in it we must have this name the  
person in the world did not specify time and place. Since it  
person and when the will and the subject regarding the time.

It is not necessary to state whether the document

holds the facts indicating it as fraudulent and dishonest. The

petition against him; he had possession of them and asked to

give petitioners access to them; also that he was in full charge

of the business and property. This is sufficient.

It is not necessary to state whether the document was necessary

should be made and the petition, but it is, the petition should

be taken into account as a document which is necessary for the

fact of such matter. *Ex parte v. United States*, 100 U.S. 100.

It does not state whether, but that the document

was.

Whether or not it is a document of fact is not

well, and the document is not sufficient.

APPROVED.

Respectfully,  
J. J. [Name]

173 - 28008

KATHERINE C. DOWNS and  
ELIZABETH C. BAILEY,  
Appellees,

vs.

AARON WOLFSON and IZIDOR H.  
FREEMAN,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

229 I.A. 688

MR. PRESIDING JUSTICE MCSURELY  
DELIVERED THE OPINION OF THE COURT.

Defendants seek the reversal of a judgment against them for \$953.32, entered April 13, 1922, by confession, on what the abstract describes as "statement of claim, cognovit, and lease." In the judgment order leave is given plaintiffs "to withdraw original note upon filing certified copy of same." In June defendants moved to vacate the judgment, and the record reads: "The court being fully advised in the premises overrules said motion."

The bill of exceptions contains the motion and sworn petition of the defendants setting forth grounds for vacating the judgment. The petition refers to a written lease and asserts that the plaintiffs "wrongfully and fraudulently failed to comply with the following provision contained in said lease, to-wit:

'FIFTEENTH: It is further understood and agreed that first parties will as soon as possible after the term herein begins, calcimine the walls and ceiling, paint the woodwork, place the plumbing, doors, windows and locks in good operating condition and replace broken window glass; this work to be done at first parties' expense once during the term of this lease.'

No other provisions of the lease appear in the bill of exceptions. The rest of the petition amplifies the assertion that plaintiffs did not do the things described in said provision.



# THE JUDICIAL BRANCH AND JUDICIAL REVIEW

The judicial branch is the branch of the federal government that is responsible for interpreting the laws of the United States. It is the only branch of the federal government that is not directly elected by the people. The judicial branch is composed of the Supreme Court and the lower federal courts. The Supreme Court is the highest court in the United States and is composed of nine justices. The lower federal courts are composed of district courts and circuit courts. The judicial branch is responsible for interpreting the laws of the United States and for ensuring that the laws are applied fairly and consistently. The judicial branch is also responsible for reviewing the actions of the executive and legislative branches to ensure that they are in compliance with the Constitution. This process is known as judicial review. The judicial branch has the power to declare laws and executive actions unconstitutional. This power is a key feature of the judicial branch and is essential for the protection of the Constitution.

The Bill of Rights is a part of the United States Constitution that guarantees certain rights to the people. It was adopted in 1791 and is one of the most important parts of the Constitution. The Bill of Rights includes the first ten amendments to the Constitution. These amendments cover a wide range of rights, including the right to free speech, the right to a fair trial, and the right to privacy. The Bill of Rights is a cornerstone of American democracy and is a key part of the United States legal system. It is the responsibility of the judicial branch to ensure that the Bill of Rights is properly interpreted and applied. The judicial branch has the power to strike down laws and executive actions that violate the Bill of Rights. This power is a key feature of the judicial branch and is essential for the protection of the Bill of Rights.

THE JUDICIAL BRANCH AND JUDICIAL REVIEW

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There is nothing in the bill of exceptions showing that it contained all the facts and circumstances presented to the court, and there is no certificate by the trial Judge that it contains all the matters presented and considered by him.

As the lease upon which the court acted is not preserved for review by us, nor all the evidence or facts presented to the trial court, we must presume that the evidence justified the order of the court denying the motion to vacate. This rule has been repeatedly approved and followed. Tyner v. Neal Institutes, 185 Ill. App. 551; Magher v. Howe, 12 Ill. 379; Knickerbocker v. Fort Dearborn Trust & Savings Bank, 219 Ill. App. 409; Magerstadt v. Abilene Nat'l Bank, 107 Ill. App. 172; C. B. & A. B. Co. v. People, 139 Ill. 536; Wilson v. McDowell, 52 Ill. 405.

The necessity for this rule appears here when the only provision of the lease appearing in the bill of exceptions is considered. It purports to state the agreement of the "first parties" to do certain things, but in the absence of the lease we do not know "who are the first parties." It further provides that they shall do certain things "as soon as possible after the term herein begins." There is nothing to show when this term begins and there is no showing, except by way of argument, as to when it was "possible" to do the work mentioned "after the term herein begins." In the absence of any facts before us, we will not assume that any of the work mentioned in this provision could have been done prior to the time judgment was entered.

Because of the fatal defects in the bill of exceptions before us, we have no basis for reversing the order of the trial court, and the judgment is affirmed.

AFFIRMED.

Matchett, J., concurs.



KATHERINE C. DOWNS and  
ELIZABETH C. BAILEY,  
Appellees,

vs.

AARON WOLFSON and IZIDOR H.  
FREEMAN,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

Defendants seek the reversal of a judgment against them for \$486.66, entered May 4, 1922, by confession on what the abstract describes as "statement of claim, cognovit, and lease." In June, 1922, defendants moved to vacate this judgment, and the record reads: "The court being fully advised in the premises overrules said motion."

The record on this appeal is in the same condition as the record in case number 28008, same parties, in which an opinion has been filed this day. Only one set of briefs has been filed in these two cases and in the following case, number 28010. What we said in our opinion in 28008 is applicable to this case, and for the reasons therein stated, which are adopted in this opinion, the judgment herein is affirmed.

AFFIRMED.

Matchett, J., concurs.





KATHERINE C. DOWNS and  
ELIZABETH C. BAILEY,  
Appellees,  
vs.  
AARON WOLFSON and IZIDOR H.  
FREEMAN,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

MR. PRESIDING JUSTICE McSORELY  
DELIVERED THE OPINION OF THE COURT.

Defendants seek the reversal of a judgment against them for \$486.66, entered June 2, 1922, by confession, on what the abstract describes as "statement of claim, cognovit, and lease." June 5th defendants moved to vacate this judgment, and the record reads: "The court being fully advised in the premises overrules said motion."

The record on this appeal is in the same condition as the record in case number 28008, same parties, in which an opinion has been filed this day. Only one set of briefs has been filed in this case and in 28008 and 28009. What we said in our opinion in case number 28008 is applicable to this case, and for the reasons therein stated, which are adopted in this opinion, the judgment herein is affirmed.

AFFIRMED.

Matchett, J., concurs.

THE UNITED STATES OF AMERICA  
DEPARTMENT OF THE INTERIOR

UNITED STATES GEOLOGICAL SURVEY  
WASHINGTON, D. C.  
BUREAU OF LAND MANAGEMENT  
WASHINGTON, D. C.

100 - 101

UNITED STATES GEOLOGICAL SURVEY  
WASHINGTON, D. C.

UNITED STATES GEOLOGICAL SURVEY  
WASHINGTON, D. C.  
BUREAU OF LAND MANAGEMENT  
WASHINGTON, D. C.

UNITED STATES GEOLOGICAL SURVEY  
WASHINGTON, D. C.  
BUREAU OF LAND MANAGEMENT  
WASHINGTON, D. C.

UNITED STATES GEOLOGICAL SURVEY

WASHINGTON, D. C.

UNITED STATES GEOLOGICAL SURVEY

WILLIAM A. CONWAY, doing  
business as Conway Coke  
& Coal Co.,

Appellee,

vs.

FRANK K. REILLY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2291A 228

MR. PRESIDING JUSTICE McSURNLY

DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for the price of coal sold and delivered to defendant, upon trial by the court had judgment for \$2,567.01.

The defense raises no serious questions of fact but seems to rely upon the inconvenience and difficulty plaintiff might have on proving delivery of every pound of coal for which payment is sought.

Plaintiff successfully met this by showing that the loads were weighed by city weighers on city scales who gave the driver a ticket for each load with gross, tare and net weight. These tickets were in duplicate and in each instance were delivered by the driver to the janitor in charge of the particular building to which the coal was delivered. The other copy was signed by the janitor and introduced in evidence. Immediately after the several deliveries a complete, itemized statement showing date, ticket, numbers, weights, kind and price was sent to defendant, the receipt of which he admits. These were produced by him upon the trial and introduced in evidence. Defendant retained these bills and never made any complaint about them until this suit was brought. He repeatedly promised to pay them and charged himself with these same items upon his

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own books. Defendant bought the coal for use in a number of houses and flat buildings which he was managing for the owners and he billed the owners of these buildings for these same weights and collected from the owners for this coal on those weights.

The evidence as to quality is equally conclusive. Experienced coal dealers and several janitors employed by defendant testified that the coal delivered was the kind ordered and billed.

A buyer is deemed to have accepted goods when they have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time he retains them without intimating to the seller that he has rejected them. After acceptance the buyer must give notice to the seller of the breach of any warranty within a reasonable time after the buyer knows or should know of such breach. Uniform Sales Act, sections 48 and 49.

The coal sued for was delivered in May, June, July and August, 1921, yet no complaint was made until the affidavit of defense was filed November 4, 1921.

It is apparent that defendant is contesting plaintiff's claim because he feels there is something due him arising out of another transaction described in a claim of set-off filed, but which the court properly struck.

Plaintiff asks that the judgment be affirmed with ten per cent damages on the ground that this appeal is prosecuted for delay. We are of the opinion that the record justifies this claim and the judgment is therefore affirmed with ten per cent damages, or \$256.70.

AFFIRMED WITH DAMAGES.

Matchett, J., concurs.

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houses and I believe which he was working for the house  
and he filled the house of some buildings for those some  
weights and collected from the house for this case on these

weights.

The evidence as to quality is usually conclusive.

Experienced coal buyers and several persons employed by  
testament testified that the coal delivered was the kind ordered  
and billed.

A buyer is known to have bought goods when they  
have been delivered to him and he does not get in relation to  
them which is inconsistent with the character of the seller, or  
when, after the lapse of a reasonable time he returns them  
without indicating to the seller that he has rejected them.  
After acceptance the buyer must give notice to the seller of the  
reason of any rejection within a reasonable time after the buyer  
knows or should know of such breach. Within reason and,  
sections 46 and 47.

The coal used for use delivered in May, June, July  
and August, 1911, yet no complaint was made until the 11th  
of October was filed January 4, 1912.

It is apparent that defendant is committing plain-  
tiff's claim because he took there is something the law  
out of another transaction received in a state of debt filed,  
but which the court properly denied.

Plaintiff claims that the defendant is indebted to him  
for coal delivered on the ground that this coal is purchased for  
delivery. As one of the parties that the record reflects this  
claim and the defendant is indebted to him for coal

delivered to him.

WITNESSES: J. J. ...

Subscribed and sworn to before me this ...

KEARSEY & MATTHEW COMPANY,  
a Corporation,

Appellee,

vs.

GEORGE READER,

Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

223 - 6386

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for a balance due on account of goods sold and delivered to defendant, had a verdict for \$1064.82. From the judgment thereon defendant appeals.

Plaintiff sold to defendant a stock consisting of ten million pills. This sale is not in dispute. Sixty or ninety days thereafter Charles A. Nichols, manager of the Chicago branch of plaintiff's business, informed defendant that it had additional stock amounting to about four million pills. Defendant agreed to buy these also, but the terms of this sale are in dispute, plaintiff claiming that it was an outright sale like the first, and defendant claiming that the excess of four million pills was sent to him on consignment to be paid for when sold. The jury accepted plaintiff's version as to the terms of the sale for this extra stock.

The only points made are four: First, that plaintiff must show by a preponderance of the evidence that the merchandise in question was sold to defendant. This rule is, of course, elementary. It is not suggested in what particulars plaintiff may have failed to meet this rule. The testimony by Mr. Nichols that the additional pills were sold outright is clear. It also appears that subsequently the parties met for the purpose of





settling certain claims made by defendant for freight and for damaged goods. These were adjusted, and a balance agreed upon. These claims are conceded by defendant to have been connected only with the sale of the second stock of pills. Plaintiff sufficiently proved its version of the transaction.

Defendant attempted to have his wife testify to an alleged conversation between Nichols and himself prior to the meeting between defendant and Nichols to adjust the account. The court properly held that she was an incompetent witness under chapter 51, sec. 5, Evidence, Illinois Statutes. A wife may testify "in all matters of business transactions where the transaction was had and conducted by such married women as the agent of her husband." Defendant offered to prove by Mrs. Reader that in the conversation with Mr. Nichols he stated that when defendant had sold all the pills he could pay for them. This does not bring the witness within the permission of the statute. She was not conducting this transaction as the agent of her husband. It was just the kind of testimony that the statute making a husband or wife incompetent to testify <sup>for</sup> or against each other as to any transaction or conversation occurring during the marriage, was aimed to prevent. She was clearly incompetent. Robertson v. Best, 93 Ill. 116; Elastic Vehicle Co. v. Price, 138 Ill. App. 594.

It is said that the oral instructions do not correctly state the law. Only criticisms of instructions appear in the argument and not the instructions themselves. Upon the trial counsel were asked whether they had any objection to the instructions, and counsel for defendant made none. No reversible error was committed with respect to the instructions.

Objection is made to the form of verdict submitted to the jury. It was conceded that defendant was indebted to



plaintiff for \$14.20, arising out of the first sale, so that in any event the jury must have found this amount due to plaintiff. The court stated this to the jury and instructed them in substance that if they should find on the main issues for the plaintiff, they should return a verdict for the amount of the balance due, or if they should find for defendant, then they should return a verdict for \$14.20, the admitted amount due. The verdict submitted was that the jury should find the issues for plaintiff and assess the damages "at the sum of \$...." and the jury were told to fill in as the amount of the verdict either \$14.20 or the full amount of plaintiff's claim. Under the circumstances this form of verdict was entirely proper.

No sufficient reason has been presented for reversing the judgment and it is therefore affirmed.

AFFIRMED.

Matchett, J., concurs.





276 - 28111

FRANK SKON and MARY SKON,  
Appellees,

vs.

BERT P. BIGGS and VERNAN A.  
BIGGS, Doing Business as  
BIGGS BROS.,  
Appellants.

100160  
APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

MR. PRESIDING JUSTICE MESURELY  
DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek the reversal of a judgment against them for \$150. Plaintiffs do not appear in this court to support the judgment.

Defendants are real estate brokers who procured a contract whereby Mary A. Doyle agreed to buy from the plaintiffs certain real estate. She deposited with defendants \$300 earnest money, but subsequently refused to proceed with the sale. Under such circumstances the contract provided that the earnest money should be retained as liquidated damages and the contract be declared null and void; that said earnest money should be held by the brokers, the defendants, and in case the contract was cancelled, it was their duty to apply the same "first, to the payment of any expenses incurred for the vendor by his agent in said matter, and, second, to the payment to vendor's broker of a commission of board rate per cent on the selling price herein mentioned, for his services in procuring this contract rendering the overplus to the vendor." Defendants proved that they, as agents for the vendors, paid a bill of the Chicago Title & Trust Co., amounting to \$24.19, on behalf of the plaintiffs; that the amount of their commissions as brokers at the contract rate was \$292.50, and therefore there was no overplus coming to

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REMARKS.

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plaintiffs, the vendors.

Apparently some evidence was introduced of a promise by one of defendants to pay Mrs. Skon \$150 out of the earnest money. The evidence that any such promise was made is not convincing and it is directly denied. The earnest money was used according to the provisions of the written contract, and we see no reason why this should not prevail.

No showing is made to sustain the judgment. The judgment is therefore reversed and judgment of nil capiat entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT.

Matchett, J., concurs.

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H. B. KEENEY et al.,  
Appellants,

vs.

WELLS FARGO & COMPANY,  
a Corporation,  
Appellees.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

229 A. 229

MR. PRESIDING JUSTICE MESURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought this suit to recover for damages and loss of goods shipped, alleged to be caused by the negligence of defendant, a common carrier. The court entered a judgment upon the pleadings against plaintiffs, from which they appeal.

The determining question involves the construction of a stipulation between the parties and their respective counsel which, plaintiffs argue, operates as an estoppel to the presentation of the prevailing defense pleaded by defendant.

Three separate suits were brought on the same cause of action, two of these in Livingston County, Illinois, and the instant suit in Cook County. The suits in Livingston County were brought first, within two years from the delivery of the goods. The instant suit was brought after two years had expired from the delivery of the goods.

In the Cook County suit defendant filed pleas in abatement, alleging the pendency of the suits in Livingston County. It is said that defendant had taken or was about to take depositions for the trial of the cases in Livingston County, but thereafter, on January 28, 1922, the parties made an agreement and written stipulation whereby the two suits in Livingston County should be dismissed and this suit in Cook County continued until the depositions taken or to be taken in Livingston County had been completed, and that

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they might be used and read in evidence upon the trial of the case in Cook County. February 27, pursuant to this agreement, the two suits in Livingston County were dismissed, and the next day copies of the declaration in the Livingston County suits, as stipulated, were filed in the present suit as a bill of particulars.

March 27 defendant filed two special pleas in the instant suit, setting up that the contract of shipment under which the goods were shipped contained provisions to the effect that suits for losses, etc., must be instituted within two years after delivery, or reasonable time for delivery in case of non-delivery; that the instant suit was not brought until more than two years after delivery of the shipment and after a reasonable time for delivery had elapsed, and therefore defendant was not liable. To these pleas plaintiff filed replications setting up the stipulation between the parties. Defendant demurred to these replications, the demurrer was sustained, and plaintiff electing to stand by its replication final judgment was entered for defendant.

The stipulation, signed by the parties and their counsel, is as follows:

#### "STIPULATION.

WHEREAS, there has heretofore been pending in the Circuit Court of Livingston County, State of Illinois, two certain suits between the parties hereto, entitled J. B. Keeney et al. v. Wells Fargo and Company, a corporation, Case No. 12447, and Industry Novelty Company, a corporation, vs. Wells Fargo and Company, a corporation, case No. 12448, and based upon the shipment of the goods set forth in the declaration herein by the plaintiff; and

WHEREAS, in said cases pending in Livingston County depositions have been or are about to be taken on the part of the defendant; and

WHEREAS, it has been agreed between the parties hereto that said causes of action should be disposed of by and through the suit pending in the County of Cook and State of Illinois, and said suits pending in Livingston County, be dismissed;

Now, therefore, it is hereby stipulated and agreed by and between the parties hereto by their respective attorneys, that copies of the declarations filed in the two cases in Livingston County, Illinois, be filed herein and have the force of a bill of particulars, with the understanding that both sides shall have the same rights in the trial of the allegations as if they had been represented separately, except that one judgment may be



They might be used and used in violation of the law in their hands. Therefore, it is necessary to take measures to ensure that the weapons are not used in violation of the law. The Government is taking measures to ensure that the weapons are not used in violation of the law. The Government is taking measures to ensure that the weapons are not used in violation of the law. The Government is taking measures to ensure that the weapons are not used in violation of the law.

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1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a very important document, as it sets out the President's policy for the new year. The President states that he is pleased to see the Congress assembled, and that he is confident that the country will be governed wisely and justly. He also mentions the recent election of Abraham Lincoln as President, and expresses his confidence in Lincoln's ability to lead the country.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN  
OTHERWISE

There is no other information available regarding the activities of the subject in the United States or abroad.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends Service Committee in the Philippines.



rendered in this action, covering both claims, for or against the consignor, and that said depositions which have been or are about to be taken on behalf of the defendant in said suits pending in said Livingston County, may be used and read in evidence upon the trial of the case in the Circuit Court of Cook County, with the same effect and subject to the same objections as if originally taken on notice in said last named suit.

It is hereby further stipulated and agreed, that the said suit pending in Cook County, Illinois, shall be continued from time to time, until said depositions be taken or to be taken in said Livingston County, have been completed and are ready for use in said suit pending in Cook County."

Careful consideration by us of this stipulation fails to find any agreement therein by the defendant to waive the defense of the time limitation for commencing suit contained in the contract of shipment. This is so self-evident from reading the stipulation that no argument is necessary. We do not know of any principle which will relieve competent parties and their experienced attorneys from the results of their deliberate and volitional agreements. The possible disadvantage resulting to one of the parties cannot be called an injustice which courts should attempt to correct by over-riding established legal rules.

Even if the stipulation were construed as plaintiff contends, an agreement to waive the contractual limitation to suits would be contrary to law and of no effect. As set forth in the pleas, defendant asserts that its schedule of rates, rules, and regulations on interstate shipments are filed with the Interstate Commerce Commission and thereby become the only lawful schedule of rates, regulations and privileges; that it was therein provided that suits must be instituted within two years after delivery or after reasonable time had elapsed, and that unless such suits were so brought the carrier should not be liable. It has been frequently decided that the parties cannot waive the terms of the contract under which the shipment was made pursuant to the Federal law. To do this could antagonize the policy of the Interstate Commerce Act and open the door to the very abuses at which the act was aimed. Georgia E. & A. Ry. Co. v. Blish Milling Co., 241 U. S. 190; Texas & Pacific Ry. Co. v.



Leatherstock, 250 U. S. 473. The opinions in these cases contain a large number of supporting citations.

From the above considerations we hold that the order of the trial court sustaining defendant's demurrer to the replications was proper, and the judgment is therefore affirmed.

AFFIRMED.

Matchett, J., concurs.

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AXEL V. TIMSEN,  
Appellee,

vs.

J. R. GEARY and W. T. GEARY,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

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MR. PRESIDING JUSTICE MEASURELY  
DELIVERED THE OPINION OF THE COURT.

Plaintiff, an architect, brought suit upon a written agreement with defendants to pay him a certain sum for drawing plans and specifications for a flat building. The agreed price was \$640, three hundred dollars of which was paid on delivery of the plans and specifications, and this suit is for the balance, with interest. Upon trial, upon a directed verdict plaintiff had judgment for \$374, from which defendants appeal.

It is undisputed that plaintiff did the work called for in the agreement, for which he was paid \$366 on account, pursuant to the terms of the agreement. It was provided with reference to the balance that "The balance of \$340 is to be paid after loan is obtained out of the first draw. In the event of a sale of the lot by you then the balance of \$340 is to be paid to me within 10 days after delivery of deed without reference to whether building is started or not." As the evidence showed that the premises were sold and the deed delivered, it would seem to be clear that the condition last above mentioned had happened and that plaintiff was entitled to his money.

It is said that the instrument is too uncertain as to time of performance to constitute a valid contract. It does not seem uncertain to us, and in view of the fact that the premises

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were sold and a deed delivered, any possible question as to time the balance was to be paid was settled.

It appears that the contract was drawn by one of the defendants, an attorney at law; hence any possible ambiguity should be used more strongly against the party preparing the contract.

Defendants sought to introduce evidence tending to show by conversations previous to the making of this agreement, that it was conditioned upon the cost of the proposed flat building, and that as this proved to cost more than the parties had expected, the condition obligating defendants to pay plaintiff had failed.

Under the well known rule, a valid written contract, purporting on its face to be a complete expression of the entire agreement, cannot be changed or contradicted by testimony as to prior or contemporaneous conversations which had been merged into the contract. Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. 102. The court properly excluded such testimony.

The doctrine of estoppel in pais is not applicable. Plaintiff did no more to create the contract than did defendants. All of the parties seem to have misjudged the cost of the proposed building; therefore no one was deceived in this respect. The defendants should be regarded as having used their own judgment in the matter.

Upon the undisputed competent evidence in the case, the only proper verdict possible was for the plaintiff, as instructed by the court. The judgment is therefore affirmed.

AFFIRMED.

Matchett, J., concurs.





340 - 28175

SYBRAN C. ZONDERVAN, Appellee,

vs.

AUGUST LANGE,

Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

*Certiorari  
denied*

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an adverse judgment in an action of forcible detainer.

Defendant occupied the premises in question under a written lease from plaintiff for a term from July 1, 1920, to June 30, 1923. The lease contained a provision that the premises "should be used only as a hardware and second-hand furniture store." There were repeated violations of this covenant by defendant, against which plaintiff protested. He served written notices on defendant calling attention to the misuse of the premises and threatened to terminate the lease unless the premises were used in compliance with the terms of the lease in this respect. Plaintiff also attempted, by bringing suit, to declare the lease forfeited for failure of defendant to observe his agreement as to use.

The defense made is that acceptance by the landlord of rent after his knowledge of non-compliance with the provisions of the lease waives such provisions and the lease cannot be terminated for failure to comply with the same.

While plaintiff accepted rent as the same accrued he was continuously objecting and protesting against the defendant violating his agreement in this respect. Under such circumstances

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This is an appeal by respondent from an adverse ruling made in an action of Federal District Court.

Respondent requested the reversal of the decision made by the court.

Respondent requested the reversal of the decision made by the court.

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the mere acceptance of rent cannot be held to be a waiver of a continuous breach of this kind. Defendant was bound to pay rent so long as he occupied the premises and its acceptance by plaintiff cannot of itself be considered as a waiver in view of his constant efforts to compel defendant to observe this covenant of the lease. The rule applicable to this situation is stated in Taylor's Landlord and Tenant, volume 2, section 500, as follows:

"Where, however, there is a continuing cause of forfeiture, the landlord will not be precluded from taking advantage of it, by receiving rent which accrued after the breach was originally committed. Thus, where the forfeiture was incurred by using two rooms in a house in a manner prohibited by the lease, such user was held to be a continuing breach, and the landlord was allowed to recover after receiving rent, provided the user continued after such receipt. Besides this, the act by which the forfeiture was waived must amount to an affirmation of the tenancy, or a recognition of its continuance; it is not enough that the landlord knows of the breach of the condition simply, without availing himself of his right to re-enter."

Big Six Development Co. v. Mitchell, 138 Fed. Rep. 279; Farwell v. Easton, 63 Mo. 446, and cases there cited.

The cases presented by defendant's counsel have to do with a single act like an assignment or subletting, or non-payment of rent upon the day mentioned in the lease. In these cases it is held that the simple breach being a completed act is waived by the subsequent acceptance of rent. That is not this case, which is the case of a continuous breach continuing in the face of the opposition and protest of the lessor.

The judgment was right and is affirmed.

AFFIRMED.

Matchett, J., concurs.

the new assignment of work which he held in the capacity of a  
complaint board of this kind. Complaints are made to you  
and as long as he remained the President and his assignment in  
this regard it is to be continued in a similar way as  
the constant efforts to keep the country in a state of  
at the time. The work which is to be done in this  
in the future and to be done in the future.

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Received 21 January 2001; accepted 21 September 2001

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11.  $\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$   $\frac{1}{4} \times \frac{1}{4} = \frac{1}{16}$   $\frac{1}{16} \times \frac{1}{16} = \frac{1}{256}$   $\frac{1}{256} \times \frac{1}{256} = \frac{1}{65,536}$

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361 - 28196

PETER MURTON,  
Appellant,

vs.

J. A. THOMAS,  
Appellee.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

MR. PRESIDING JUSTICE MCNEELY  
DELIVERED THE OPINION OF THE COURT.

Judgment for \$323 was entered against defendant on a cognovit in a judgment note signed by defendant and delivered to plaintiff. Subsequently a motion to vacate the judgment was made, supported by an affidavit. This motion was allowed and the affidavit was allowed to stand as an affidavit of merits to the suit. Upon trial the court found the issues against plaintiff and judgment was accordingly entered, from which he appeals.

The bill of exceptions has heretofore been stricken from the record. There is therefore before us for consideration only the statutory record.

It is said that the affidavit stated no fact which, in law, constitutes a defense upon an action on the note. The affidavit says that the note was given in consideration and upon the promise of the plaintiff to secure for the defendant a general contract on a building about to be erected, of which plaintiff was the general superintendent; that plaintiff in violation of his agreement secured the general contract for himself and prevented defendant from securing the same; that defendant then demanded the return of the note, which plaintiff promised to return, and that defendant received no other consideration for the execution of the note and that the consid-

THE UNITED STATES OF AMERICA

vs.

J. A. THOMAS, Plaintiff,

THE UNITED STATES OF AMERICA  
vs.  
J. A. THOMAS, Defendant.

IN SENATE, JANUARY 10, 1910.

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE.

The following is a statement of the facts as they appear in the records of the General Land Office, and as they are given by the witnesses who have been examined in the case. It is not intended to be a statement of the facts as they appear in the records of the General Land Office, and as they are given by the witnesses who have been examined in the case. It is not intended to be a statement of the facts as they appear in the records of the General Land Office, and as they are given by the witnesses who have been examined in the case. It is not intended to be a statement of the facts as they appear in the records of the General Land Office, and as they are given by the witnesses who have been examined in the case.

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eration has wholly failed.

This falls under the provision of paragraph ten of the Negotiable Instruments Act which, in substance, provides that in an action upon a note for the payment of money, if it was made and entered into without a good and valuable consideration, or if the consideration upon which it was made or entered into has failed, it shall be lawful for the defendant to plead such want of consideration or that the consideration has failed; and if it should appear that the instrument was made without a good or valuable consideration or that the consideration has failed, the verdict shall be for the defendant.

The affidavit of merits did not purport to present an oral contemporaneous agreement in contradiction of the terms of the note, nor an agreement to make it payable only on a contingency. The defense went solely to the point of consideration for the note.

In the absence of a bill of exceptions we cannot consider points raised touching the evidence. The judgment is affirmed.

AFFIRMED.

Matchett, J., concurs.

operation has finally failed.

That failure under the provision of paragraph 10 of the Negotiable Instruments Act, 1881, in substance, provides that in an action upon a note for the payment of money, it is not necessary to establish that a good and valuable consideration was given for the consideration upon which it was made or received, or that the consideration upon which it was made or received was good and valuable, it shall be lawful for the defendant to plead such want of consideration as that the consideration was made void; and it is hereby agreed that the defendant was made void of a good and valuable consideration by that the consideration was failed, the parties shall be for the defendant.

The plaintiff of course did not dispute to present an oral statement of evidence in relation to the value of the note, nor an agreement to make it payable only for a certain sum. The plaintiff went on to the point of consideration for the note.

THE COURT.

In the absence of a bill of exchange or promissory note, the plaintiff is bound to establish the value of the note.

IN WITNESS.

ATTEST.

WITNESSES.



386 - 28221

JOHN SAKALAS and JOSEPH SAKALAS,  
Appellees,

vs.

CHARLES S. BONESTEEL,  
Appellant.

3021A  
APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.  
223 LA 639

MR. PRESIDING JUSTICE MCSURELY  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an adverse judgment in an action of forcible detainer.

Defendant was a tenant in an apartment building belonging to plaintiffs under a lease terminating April 30, 1922. Defendant not vacating when this expired, plaintiffs brought this action.

Defendant claims the right to remain in possession by virtue of an alleged verbal agreement made in March, 1922, to give defendant another lease for another year. The wife of defendant apparently had been injured through the claimed negligence of the plaintiffs with respect to the premises occupied, and one of the plaintiffs admits that in a conversation with Mrs. Bonesteel he agreed "if she did not sue us I would give her another lease for another year at the same rental."

For two reasons at least, this alleged agreement cannot prevail. (1) It was a conditional offer and there is no evidence of the performance by Mrs. Bonesteel of the condition<sup>of</sup> the promise. (2) At most it was a verbal offer or agreement made March 1, 1922, for a lease for a year beginning May 1, 1922, and hence subject to the inhibition of the Statute of Frauds. Wheeler v. Frankenthal, 78 Ill. 124.

The judgment was right and it is affirmed.

AFFIRMED.

Matchett, J., concurs.

JOHN B. BROWN and J. H. BROWN,  
Defendants.

vs.

WILLIAM C. BROWN,  
Plaintiff.

1933-1934

IN SENATE

BEFORE THE COMMITTEE ON THE JUDICIARY

This is an answer by defendant to an adverse complaint

in an action of tortious interference.

Defendant was a tenant in an apartment building belonging

to plaintiff under a lease immediately after Mr. Brown. Defendant was

evicted when this complaint was filed in this action.

Defendant claims the right to remain in possession by virtue

of an alleged verbal agreement made in March, 1933, to give his

tenant another lease for another year. The wife of defendant ap-

parently had been injured through the alleged negligence of the

plaintiff's wife removed to the premises occupied, and one of the

plaintiff's claims that in a conversation with Mr. Defendant he agreed

"if she did not and as I would give her another lease for another year

at the same rental."

For the reasons set forth, this alleged agreement cannot

prevail. (1) It was a conditional offer and there is no evidence of

any acceptance by Mrs. Defendant of the conditional promise.

(2) It was a verbal offer of agreement made March 1, 1933,

for a lease for a year beginning May 1, 1933, and hence expired in

the expiration of the lease of March. *See* *Smith v. Smith*, 10

Ill. 104.

The contract was void and is null and void.

WITNESSES,

Attest, 1934, January.

387 - 28222

JOHN SAKALAS and JOSEPH  
SAKALAS,

Appellees,

vs.

C. W. RAVEN,

Appellant.

30221  
APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.  
229 1.A. 640

MR. PRESIDING JUSTICE McSURELY  
DELIVERED THE OPINION OF THE COURT.

Defendant was a tenant of an apartment at 4009 Lake Park avenue, Chicago under a lease from plaintiffs which terminated April 30, 1932. Defendant failed to move, and June 1, 1932, plaintiffs brought this action in forcible detainer and had judgment for possession.

Defendant's point seems to be that because this action was not brought sooner he became a holdover or a tenant at will, and therefore was entitled to a notice and demand for possession. The point is untenable. At the expiration of the lease, the lessee still continuing in possession, the lesser had the election to treat him as a tenant or as a trespasser. The bringing of this forcible detainer action was evidence of an election to treat him as a trespasser.

Defendant should have yielded possession at the expiration of his lease. The finding for plaintiffs was proper and the judgment is affirmed.

AFFIRMED.

Matchett, J., concurs.





388 - 28223

JOHN SARALAS and JOSEPH SARALAS,  
Appellees,

vs.

D. W. RAVEN,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

MR. PRESIDING JUSTICE McGUIRE  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an adverse judgment in a forcible detainer suit brought by plaintiffs for possession of an apartment at 4011 Lake Park Avenue, Chicago.

Defendant occupied the premises under a lease expiring April 30, 1922, and failing to give possession when the lease expired, this action was brought. The defense seems to be that because of some kind of notice the lease "was broken" and the defendant became a tenant from month to month and entitled to a sixty-day notice to terminate."

The abstract gave us virtually no information as to the alleged notice except that it was a demand for rent, signed by the wife of one of the plaintiffs, apparently dated in August, 1920. The notice is not in the record and we cannot tell its character or upon whom it was served, if upon anyone.

In any event, as it apparently was served in August, 1920, eight months before the lease expiring April 30, 1921, was entered into, it was incompetent and immaterial, as it could not affect in any way the subsequent lease of the parties.

The judgment is affirmed.

AFFIRMED.

Hatchett, J., concurs.



PEOPLE OF THE STATE OF ILLINOIS  
ex rel. EDGAR FRANK HEISKELL,  
Appellant,

vs.

ROBERT BLACK, WILLIAM A. QUINN,  
FRANK F. PHIFER, GEORGE MANONEY,  
U. S. GRIM, ERIKA VAN ROOBER,  
HARRY SCHMITZ, E. J. MAHAN and  
LOYOLA UNIVERSITY, a Corporation,  
Appellees.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The relator, Edgar Frank Heiskell, filed a petition in the Circuit court of Cook County against appellees, defendants in that court, in which he prayed that a writ of mandamus issue directing the defendants to correct the records of Loyola University so that the same would speak the truth concerning the grades received by the relator while a student at that institution, and that the defendants might be required to recommend the relator for the degree of Doctor of Medicine, and that Loyola University might be directed to forthwith confer upon the relator the degree of Doctor of Medicine.

To this petition the defendants filed a general and special demurrer, and the trial court, being of the opinion that the demurrer was well founded in point of law, sustained the same, and the relator having in open court elected to stand and abide by his petition, a judgment for costs in favor of the defendants and against the petitioner was entered.

It is assigned as error that the court sustained the demurrer of defendants, in failing to overrule it, and in not granting the relief prayed for.

The relator by his petition averred that he was a citizen of the State of Illinois, and having selected the practice of medicine and surgery as his profession and life work,

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

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1. *Phragmites australis* (Cav.) Trin. ex Steud.  
 2. *Phragmites australis* (Cav.) Trin. ex Steud.  
 3. *Phragmites australis* (Cav.) Trin. ex Steud.  
 4. *Phragmites australis* (Cav.) Trin. ex Steud.  
 5. *Phragmites australis* (Cav.) Trin. ex Steud.

6. 1990. *Journal of the American Water Resources Association*, 26: 103-112.

The records of the Department of the Interior, Bureau of Land Management, show that the land in question was acquired by the United States Government in 1890, and that the same was then conveyed to the State of California by the Act of March 3, 1891, Chapter 22, Section 1, of the Statutes at Large, 26 Stat. 1095.

[illegible]

It is suggested that the following be included in the report of the Committee on the subject of the proposed amendments to the Constitution of the United States.

THE SECRET OF THE POLICE DEPARTMENT



in order to fit and prepare himself for said profession and work, on or about the first day of October, 1914, entered the University of West Virginia as a student; that he diligently and faithfully pursued the course of studies prescribed by the faculty of this university for a period of two years, and during that time successfully completed and passed the work assigned to him; that thereafter, on or about the eighth day of October, 1916, he entered the University of Maryland, where he faithfully and diligently prosecuted his studies in medicine and surgery for a period of one year; that he successfully completed and passed the work assigned to him in said University, except the subject of physiology, in which subject he received what is termed a "condition," which meant that he would be entitled to receive credit in that particular subject whenever he should satisfactorily pass a further examination therein; that after he had attended the University of Maryland for one year he moved from the State of Maryland to the State of Illinois; that during the time he had attended the Universities of West Virginia and Maryland he had duly pursued the studies prescribed for him and was duly qualified to enter the senior class of the said University of Maryland; that on or about the 5th day of October, 1917, he entered the medical department of Loyola University and matriculated as a student therein and became a student in the College of Medicine and Surgery connected with the said University; that Loyola University was and is an institution organized and existing for the purpose of qualifying students in the practice of medicine and surgery and is duly incorporated under the laws of the State of Illinois and duly authorized by said laws; that at the time of his matriculation in the said College of Medicine and Surgery he conferred with the secretary of the medical department of the University, who was qualified and authorized to register students and pass upon their qualifications and recognition to be



given for credits received by students registering from other institutions of learning; that the said secretary approved and recognized all of the credits theretofore obtained and earned by the relator at the Universities of West Virginia and Maryland, but that the relator was not permitted to enter the senior class at that time by reason of the fact that he had not satisfactorily passed the course in physiology at the University of Maryland and had received a "condition" in that subject; that under the rules and practices of the defendant University the subject of physiology was classified as a sophomore subject and no student could be permitted to enter the senior class with a "condition" in a sophomore subject; that thereupon it was arranged by the said secretary that if relator passed one semester of junior work he would be permitted to enter the senior class, provided that during that time he attended the course in physiology each week and satisfactorily passed said course. The relator avers that he attended regularly and faithfully at the said institution during the full semester and pursued and studied the junior studies prescribed for him; that at the end of the semester he passed all of the junior subjects so pursued by him with the exception of the subject of dermatology, in which subject he received a "condition;" that he was informed by the said secretary, to whom the instructors in the institution reported and who preserved the individual records of the students, that the relator had a clear record as to physiology and had complied with all the rules, regulations and practices of the institution and satisfactorily passed and completed the prescribed course of study; that he might go ahead with the work of the senior class subject only to the removal of the "condition" received in the course of dermatology; that under the rules, practices, etc., of the institution no student was permitted to enter the senior class until furnished with a written pass or permit







signed by the secretary of the medical department; that the relator received such written pass or permit from the said secretary and entered the senior class on or about the first day of February, 1918, and thereafter attended regularly and faithfully all of the classes in the work assigned to him as a student of said senior class; that under the rules of the institution the work of the senior class was divided into periods of time known as semesters, and that in order to be entitled to a degree in medicine, a student must have satisfactorily completed two semesters of work in the senior class, besides having satisfactorily passed all his prior work.

The relator further avers that during the first semester of the senior class, beginning on or about February 1, 1918, and ending on or about June 1, 1918, he diligently pursued the studies prescribed for him and at the conclusion of the semester satisfactorily passed all of the examinations upon the senior class subjects which he had been studying and received credit therefor upon the records of the institution; that at the conclusion of the same semester he was given an examination in junior dermatology for the purpose of removing the "condition" theretofore received in that subject; that subsequently at different times, alone and in company with other students, the relator called upon the instructor of the course of dermatology and was advised by the instructor that everyone had passed said course; and the relator avers that the examination so taken was the regular and usual examination given to the students who had pursued the course in junior dermatology for that semester and was taken by the relator at the same time that the examination was given to the regular members of the junior class.

The relator avers that there was a rule or regulation in force to the effect that in the event that no grade was reported to the secretary of the medical department by an instructor in an



examination conducted by him within ten days from the time of such examination, then such student or students as had not received their grade in that subject were to be given and receive a passing grade; that the instructor in this particular subject did not report the grade received by the students who took the examination in said subject with relator and that it is therefore averred that the relator satisfactorily passed the course in junior dermatology and that the "condition" theretofore received by him in that subject was removed; that at the end of the second semester, namely, on or about the first day of June, 1918, the seniors who had satisfactorily completed the senior work and had removed all "conditions" were regularly graduated from the institution; that because the relator began the work of the senior class at the beginning of the second semester he did not become entitled to graduate until after the completion of a further semester of senior work; that after the completion of the second semester and on or about the first day of June, 1918, a new semester began, which continued until on or about the first day of September, 1918, and at that time the senior students, who had satisfactorily pursued the work prescribed for them and who were otherwise entitled by reason of having satisfactorily passed a previous semester of senior work, would become and be entitled to graduate from the institution.

The relator avers that on or about the first day of June, 1918, he began the work of the senior class in the said semester beginning about that time; that the course in senior dermatology was a part of the requirements for all members of the senior class for said semester, and relator, with other students, pursued the said course of study as offered and given, but at the conclusion of the semester the relator objected to taking an ex-







amination in said subject because he had taken the course and satisfactorily passed an examination in the preceding semester; that Dr. Wynken, the secretary of the medical department, thereupon announced that such examination which he objected to, if satisfactorily passed at that time, would remove any back work or "conditions" in dermatology, and the relator thereupon took the said examination and satisfactorily passed it and thus again became and was entitled to a clear record in dermatology.

The relator avers that on or about the first day of September, 1918, he contemplated leaving the institution for military service in the army of the United States; that he went to the secretary of said institution to ascertain the condition of his record and was thereupon informed and advised that he had a clear record, and that if he passed the semester's work that he would graduate and receive a diploma.

It is further averred that at the conclusion of the semester's work, on or about the first day of September, 1918, relator did satisfactorily pass all the work assigned to him and that at said time he had, in accordance with all rules, practices and regulations of said institution, attended all the branches of subjects offered by said institution in the requisite time to be spent by him in order to fully complete his course and he had satisfactorily passed all of the branches of study requisite to the completion of a full course in medicine and surgery, including the removal of each and every condition which might have been received by him; that therefore it became and was the duty of the Council of the Medical School of the Loyola University to recommend the relator to the Board of Trustees for the degree of Doctor of Medicine, and upon such recommendation it became and was the duty of the Board of Trustees to confer upon the relator the degree of Doctor of Medicine; that on the 3rd day of January, 1919, relator,

[illegible]

to get caught and have to go to jail every night.

and the fact that the Government has been unable to secure the necessary funds to carry out its program of social and economic reform, it is not surprising that the Government has been unable to secure the necessary funds to carry out its program of social and economic reform.

and 74, respectively, will be held together tightly at 25

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having enlisted in the United States Army, pursuant to a regulation of the War Department, was permitted to continue his attendance at the institution until ordered to report for active military service; that on or about the 23rd day of August of that year he was ordered by the War Department to report for active duty at the military encampment known as Camp Custer, Battle Creek, Michigan, and thereupon found it necessary to leave school prior to and before the day upon which the degrees of Doctor of Medicine were customarily conferred; that, however, before leaving the said institution he, with other students<sup>who</sup> were also in the army and likewise situated, were advised and informed by Dr. Wynneken that students so entering the military service of the United States would have the degree of Doctor of Medicine conferred upon them on the day on which the degrees were customarily conferred at the college, and that the relator would receive at the military encampment to which he was assigned the customary and usual certificate evidencing such fact; that notwithstanding said promise the relator did not receive his certificate, whereupon he wrote letters to the authorities of the University to ascertain the facts, but that no reply was made to any of these letters of inquiry; that afterward, while upon furlough, he went personally to the institution to make inquiry as to the reason why he had not received his degree and was informed that the record did not show the removal of the "conditions" in physiology and junior dermatology; that he thereupon protested that said "conditions" had been duly removed and that he had done all of his work satisfactorily as prescribed and was entitled to have his degree conferred upon him; that on or about January 3, 1919, he was discharged from the army and again called at the office of the institution and renewed his request, but was informed by the institution, through its Regent, one Father Mahon, that he would be







required to take work in the institution in a further term of school and remove the alleged "conditions" in physiology and junior dermatology; that he refused to do so because he had theretofore received credit in each of said courses; that he conferred with the deans of the various departments of the medicine school and they advised him that if he would bring the matter before the faculty it would be cleared up, but that the Regent wrongfully, wickedly and maliciously refused to permit the relator to go before the faculty of the institution, or present the matter to the faculty for consideration; that Dr. Syncken, who had been secretary of the institution at the time that the relator entered it and during all the time that he had attended said institution, wrote the Regent of said institution on June 18, 1919, advising him of the facts as stated. A copy of said letter appears in the bill.

The petition alleges that the Council of the School of Medicine has acted arbitrarily with the wicked and malicious design solely of depriving the petitioner of his degree of Doctor of Medicine; that the said Council at all times well knew that relator had duly complied with each and all the requirements, rules and regulations of the institution, and that there was in fact no condition in any subject which had not been removed, and that by pretending that he had not removed the alleged conditions, they were abusing their powers as members of the Council of the School of Medicine.

The petition further alleges that in these respects the Council of the School of Medicine, composed of the eight persons named as defendants, have discriminated in favor of other students while wilfully denying to the relator the rights and privileges to which he had become entitled by reason of his

10. The above information is true and correct to the best of my knowledge and belief.

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and that "continued to be in use at different lengths and positions."

Further off to specialized business not to waste our data storage

Submitted: 12/10/2014; Accepted: 04/11/2015; Published: 05/11/2015

Figure 10.10: A plot of the function  $f(x) = \sin(x)$  for  $x \in [0, 2\pi]$ . The function is periodic and oscillates between -1 and 1.

See full names of leaders throughout the document, especially

There is no change in the position of the

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*This article was accepted for publication in its present form after revision on 10 November 2009.*

And yet, Page said, the 100,000 jobs that the 100,000 workers will produce in 2003 is much less than the 100,000 jobs that the 100,000 workers will produce in 2004.

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Reference: *Journal of the American Medical Association*, 1997; 277: 1001-1005.

It is not possible to find the exact date of the first publication of the book.

© 2000 Blackwell Science Ltd *Journal of Internal Medicine* 247: 105–112

1. The above information is correct and true to the best of my knowledge and belief.

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faithful attendance and study at said institution and his complete compliance with all the rules and regulations and practices of said institution; that his studies have been pursued at great expense and much time; that he desires to make the practice of medicine his life profession and that he depends upon this profession for his living; that by the failure and refusal of the defendants to so recommend, he has been greatly handicapped in the practice of medicine and suffers greatly from loss of prestige to which he is lawfully and by right entitled. Relator states that the question here presented not only involves the individual rights of himself, but the rights of other students of other colleges and institutions of learning after complying with all the provisions, rules and regulations of institutions necessary to receive the degree for which they studied and attended such institutions, without being subjected to the annoyance, inconvenience and expense of having such right withheld by reason of arbitrary or capricious acts by any party or individual acting in behalf of such institution.

The effect of the demurrer filed by the defendants was an admission on their part of the truth of all the facts stated in the petition, which are well pleaded. The law applicable to such a state of facts is fairly well settled. It is undoubtedly true as a general rule, that courts of law being unlearned in the subject of medical science, will not attempt to pass upon the qualifications of a medical student in a dispute between that student and the faculty of the school which he has attended as to whether he possesses the requisite qualifications to entitle him to a degree. Such was the holding of this court in the case of Kennel v. Bennett Medical College, 205 Ill. App. 324. In all such cases the controlling question seems to be whether the act which the petitioner asks shall be compelled is one within the reasonable



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discretion of the party or parties whom it is desired to coerce. If the act to be performed is only a ministerial one, or if the defendant in its refusal is acting arbitrarily, maliciously or without reasonable discretion, then mandamus will lie to compel the performance of a duty which ought to be performed. The general rule is stated in the note on this subject in L. E. A. 1918-9, page 616, where it is said:

"Where the applicant has been found duly qualified by the proper authorities and the issuance of a diploma does not depend upon discretionary acts but only upon ministerial acts, the performance of which is arbitrarily refused, it seems that mandamus will lie."

See also 18 N. C. L., page 168, par. 85. The reason for the rule has been set forth in numerous cases, some of which are: People v. Bellevue Hospital Medical School, 66 Hun. 188, 14 N. Y. Supp. 490, aff'd in 133 N. Y. 621, 20 E. 2. 323; State of Nebraska ex rel. v. Lincoln Medical College, 116 N. W. 204. That mandamus will lie to compel the correction of records of a certification of this character so as to make them speak the truth, has been decided by the courts of this State in Van Born v. Anderson, 219 Ill. 32; People v. Pettit, 266 Ill. 828.

It is argued in support of the demurrer that the petition states conclusions rather than facts, and it is particularly urged that the petitioner should have alleged the percentage or exact marks received by him upon taking the examinations through which the "conditions" imposed were removed. It appears clearly, however, from the petition that these records were in the possession of the defendants and not in the possession of the petitioner. The ultimate fact was whether petitioner passed or failed to pass such examinations.

We think, under the rules of law as set forth in the decisions cited, the facts as pleaded entitle the petitioner to the



relief prayed for and that the court erred in sustaining the demurrer, and for this reason the judgment will be reversed and the cause remanded with directions to over-rule the demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

McBride, C. J., concurs.

and the maintenance of peace from the fact that the United States  
 has always been a peace-loving nation and has always been a  
 champion of the rights of the small nations of the world. The  
 United States has always been a peace-loving nation and has always  
 been a champion of the rights of the small nations of the world.

Washington, D. C., January 1, 1918



51 - 27881

CITY OF CHICAGO,

Appellee.

vs.

RYAN-POLSKY COMPANY,  
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant who appeals was fined \$25 and costs after hearing by the court on a charge that it had violated sections 1433 and 1437 of the code of the City of Chicago.

Section 1433 makes it an offense for any person to keep, permit or suffer premises to remain for two hours in such a condition as to be offensive to the neighborhood, or prejudicial to the public health. Such a place is declared to be a nuisance.

Section 1437 provides:

"No lime, ashes, coal, dry sand, hair, feathers or other substance that is in a similar manner liable to be blown by the wind, shall be sieved or agitated or exposed; nor shall any mat, carpet or cloth be shaken or beaten, nor any cloth, yarn, garment or material or substance be secured, cleaned or hung, nor any business be conducted over or in any street or public place, or where particles therefrom set in motion thereby will pass into any such street or public place, or into any occupied premises; \* \* \* ."

The record does not disclose under which of these sections the fine was imposed.

It is assigned as error that the ordinance is unconstitutional, but this assignment is waived by the appeal to this court.

It is urged that the trial court erred in admitting

1. The defendant was charged with the murder of the victim, a woman, on the 1st day of January, 1934, at the city of Chicago, Illinois.

10-1-1944

[illegible]

incompetent and immaterial evidence, but as the trial was by the court and not by a jury, this if true would not be reversible error provided there is sufficient evidence in the record to sustain the finding of the trial court.

It is urged that competent evidence as to the character of the neighborhood in which defendant's business was situated was improperly excluded, but we find upon examination of the record that while at first rejected this evidence was afterwards admitted, and was practically uncontradicted.

The violation of the ordinance was alleged as under date of December 23, 1921, and it is urged that evidence as to the condition of defendant's premises on other dates should not have been received. The charge was not a felony and the proof was as to time within the limits of the statute of limitations. The contention is therefore without merit.

It is urged that in such a case the violation of the ordinance must be proved by a clear preponderance of the evidence. We have so held in City of Chicago v. Barrett Mfg. Co., 192 Ill. App. 460. It is urged that there is no such "clear" preponderance of the evidence tending to show that defendant was guilty. We have examined the evidence and do not think that we can say that the court was not justified in holding that the proof clearly showed one or more violations of the ordinance.

The judgment will therefore be affirmed.

AFFIRMED.

McSurely, P. J., concurs.

incompetent and incapable witness, but on the trial was it  
the court and not by a jury, and it was not to be reversible  
error provided there is sufficient evidence in the record to  
sustain the finding of the trial court.

It is urged that competent evidence as to the character  
of the defendant in this defendant's business was offered  
and was properly admitted, but we find upon examination of the  
record that this is not correct. This evidence was not  
admitted, and was properly excluded.

The finding of the jury was that the defendant was under  
the age of twenty-one years, and it is urged that evidence as to  
the condition of defendant's business at that time should not  
have been received. The court was not a judge and the jury  
was to be the judge of the facts of the case. The finding  
The defendant is innocent of the crime.

It is urged that in such a case the finding of the  
jury should be given by a direct statement of the evidence.

We have no doubt in State v. Houghton, 120 Ill.  
App. 407. It is urged that there is no such "evidence" as

at the evidence given to show that defendant was guilty. We  
have examined the evidence and we find that it is not such that  
the court was not justified in finding that the jury clearly  
showed that on more view of the evidence.

The judgment will therefore be affirmed.

Reversed.

Reversed. 5-4-11 affirmed.



91 - 27923

THOMAS D. HEAL, Plaintiff in Error,

vs.

GEORGE W. WINSLOW, Defendant in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

229 I.A. 640<sup>5</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case there was a trial by the court without a jury and a finding for the defendant and against the plaintiff and a judgment against the plaintiff for costs, to reverse which this writ of error was sued out by the plaintiff.

The suit was begun by causing judgment by confession to be entered against defendant for the amount of five promissory notes for the principal sum of \$500 executed by defendant Winslow and payable to the order of Albert Pick & Company and by them endorsed and delivered. The notes were secured by a chattel mortgage executed by the defendant Winslow.

The confession of judgment was entered October 29, 1921. On November 14th thereafter, the defendant Winslow filed an affidavit in support of his motion to set the judgment aside, in which he set up that he was not indebted on the notes, stating the facts to be that these notes were his own property; that on March 5, 1921, he was possessed of a billiard hall located at 5038 Broadway, which plaintiff at that time purchased from defendant for the agreed price of \$9,000; that defendant by agreement received in part payment of the consideration, five sectional bowling alleys at an accepted valuation of \$4,000; that on March 7, 1921, plaintiff and defendant agreed that as additional consideration, plaintiff would pay these five promissory notes to Albert Pick & Company; that the balance of the consideration, namely, \$4,500,

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was met by a note for \$1,000 due on the 17th day of March, which has been paid by plaintiff to defendant, and by other promissory notes, part of which have been paid, which notes defendant is ready to produce in court.

The principal assignment of error argued is that the finding of the court is against the manifest preponderance of the evidence. Upon trial, the plaintiff having produced the notes duly assigned, the defendant assumed the burden of proving the defense set up in his affidavit. The defendant on the trial testified that the original contract for the sale and exchange of these properties had been changed after it was executed, in that an item of \$4,000 appearing therein, under the \$9,000 which was the consideration, had been changed to \$4,500, and that an item in the second column which now reads \$5,500 in the document as executed read \$4,500. There are erasures on the exhibit indicating that these items had been changed and the plaintiff admits that the same were in fact changed, but he says that this was done prior to the time of the execution of the contract and with defendant's knowledge.

The testimony of the defendant is in part corroborated by a witness to the contract, one Mr. Gregg, in whose custody the contract was left after its execution on the 6th day of March until the morning of the 7th day of March, at which time the transaction was completed. He testified that one of the items had been changed. On the other hand plaintiff testified that both the changes were made prior to the execution of the agreement, the one upon reflection by the parties that the contract included the lighting fixtures and the other because of a simple mistake in addition, while Mr. Shaw, an attorney who drew the bill of sale and new chattel mortgage executed on the 7th day of March, corroborated the testimony of the plaintiff







to the effect that no changes had been made in the contract since that time.

The written agreement of March 6, 1921, is as follows:

"Contract of Sale and Trade of 5 sectional alleys comp. with 20 balls, Finns and pin setters floor type and all electric light fixtures, cuspidors, score bulletins, 5 player benches, all tools and outfit for to take care of alleys in trade, on the place of G. W. Winslow at 5038 N. Broadway Billiard parlors at Broadway.

Consideration is	9000.	from
which a credit	4500	alleys
for 5 alleys above	1000	cash
Listed of 4500	5500	9000
cash 1000		5500
<u>5500</u>		<u>9000</u>

All the above place is to be free and clear from all incumbrances. The \$3500 less Albert and Pick loan on tables is to be taken out of 3500. Ball, to be secured by mortgage and notes for 3 years with payments of \$100 per month after Pick mortgage taken care of."

This contract, as before stated, was executed by the parties and left in the custody of the witness Gregg, who was a telegraph operator at the Union Station in Chicago, and a cash deposit of \$25 was made to bind the deal. On the Monday following, 7th of March, the parties went to the office of Joseph J. Shaw, an attorney, at which time defendant Winslow executed a bill of sale in which the consideration was stated to be the sum of \$10 and other good and valuable considerations and which purported to convey the contents of the billiard parlor at 5038 Broadway. At the same time plaintiff Neal executed and delivered to defendant Winslow, a bill of sale in and by which he conveyed the 5 sectional bowling alleys, with other property, in storage at the Red Line Storage Warehouse at Champaign, Illinois.

Neal, it is conceded, did not have the \$1,000 in cash and a chattel mortgage note for \$4,500 was therefore executed, dated March 7, 1921, to the order of Winslow, the note stating that \$1,000 of that amount would be payable on or before March



17, 1921; \$100 or more on the 7th day of each and every month beginning on August 7, 1921, the final payment to be made on March 6, 1923, of the whole amount of the principal remaining unpaid, with interest at six per cent per annum. Neal reconveyed by mortgage to secure this note, the property situated at 5038 Broadway, which he was purchasing from Winslow.

In addition to the evidence already spoken of, which it is claimed tends to sustain the contention of the defendant that plaintiff had changed the original contract, are the admitted facts that on Monday, the 7th day of March, the parties went to the office of Albert Pick & Company and that the amount of interest due upon the mortgage given by Winslow to that company was calculated up to that date and that Winslow gave to Pick & Company his check for the amount of such interest due on that date. An employee of Albert Pick & Company testified that a statement was there made to the effect that plaintiff Neal would assume and pay these notes. There is further evidence by one Brown, former employee of both defendant and plaintiff at the Billiard hall, to the effect that plaintiff told him in a conversation some two days after the deal was made that the property transferred by plaintiff to defendant in part payment for the billiard hall outfit was taken at \$4,000. We do not think that this evidence, which is inconsistent with the affidavit of defense filed by defendant and which is contradicted by the written evidence and documents executed between the parties, can be considered as controlling.

The decision of the matter does not depend alone upon the oral evidence as to the admitted change made on the face of the contract of March 6th. The body of that contract expressly states that the property was to be transferred to the plaintiff Neal, free and clear of all incumbrances and that the Albert Pick & Company loan on the tables was to be taken out of







the \$3,500. The defendant himself admitted on cross-examination that this provision of the agreement had not been changed in any way and it is wholly inconsistent with the defense which he attempts to set up. Defendant in error in his brief and argument states that the record has been changed so as to show this admission, but this is denied by the statement of plaintiff in error and this bare allegation cannot be accepted as against the record certified by the trial court which heard the case. Even if the oral evidence tending to vary the written instruments was properly received, such evidence could avail little as against the specific writing signed by the parties. A persuasive circumstance is the uncontradicted evidence that the original contract was executed in duplicate and that defendant neither produced his own copy nor explained its non-production.

We think that the finding of the trial court was wholly unwarranted under the evidence submitted and that there should have been a finding for the plaintiff and judgment for the full amount of the notes and interest. The judgment of the trial court will therefore be reversed with a finding of facts and judgment here for the sum of \$577.19.

REVERSED WITH FINDING OF FACTS  
AND JUDGMENT HERE.

McSurely, P. J., concurs.



91 - 27923

FINDING OF FACTS.

We find as facts that plaintiff in error here and plaintiff in the trial court, Thomas D. Neal, is the owner of five promissory notes for the sum of \$100 each dated January 8, 1921, payable to the order of Albert Dick & Company, with interest at the rate of seven per cent per annum from date; that the defendant, George W. Winslow, who is defendant in error here, is the maker of said notes; that there is due from said George W. Winslow to said Thomas D. Neal on account of said notes the said sum of \$500 with interest thereon from January 8, 1921, to the 15th day of March, 1925, making a total sum of \$577.12, for which judgment should be entered against the said George W. Winslow and in favor of said Thomas D. Neal.





116 - 27949

AURORA TAXI CO., a Corporation,  
Appellee,

vs.

THE YELLOW CAB MANUFACTURING CO.,  
a Corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

229 - 1117

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment in the sum of \$400 entered on the verdict of a jury directed by the court at the conclusion of all the evidence.

The plaintiff sued for the return of \$400 deposited with an order for four taxicabs given by plaintiff to a salesman of defendant, one Yagel, on May 11, 1920. The uncontradicted evidence tends to show that the order was not accepted, and there is also uncontradicted evidence tending to prove that it was agreed between the parties that the order should not become absolute except upon the happening of certain specified contingencies. These contingencies were that a company should be incorporated under the name of the Yellow Cab and that people should be found who would be willing to put their money into this company. In the event that this corporation was formed and the money obtained, a written contract between the parties, covering the subject-matter of the agreement, was to be executed.

These contingencies did not occur, and on October 1, 1920, plaintiff wrote defendant cancelling the order and requesting the return of the money deposited. October 9th defendant replied, stating: "We accept cancellation of the same and by the right accorded us we will retain the deposit."

Many points have been stated in the brief of appellant, some of which are wholly irrelevant to any question

THE UNITED STATES OF AMERICA  
IN SENATE

REPORT  
OF THE  
COMMISSIONER OF THE  
GENERAL LAND OFFICE  
IN RESPONSE TO A RESOLUTION  
PASSED BY THE SENATE  
MAY 11, 1894

ALBANY: JAMES B. LEECH, PRINTING OFFICE, 1894.

This is an account of the progress of the work of the General Land Office during the year ending June 30, 1894. It is divided into two parts, the first of which contains a general statement of the work of the office, and the second a detailed statement of the work of the various divisions. The first part is divided into four sections, the first of which contains a general statement of the work of the office, and the second a detailed statement of the work of the various divisions. The second part is divided into four sections, the first of which contains a general statement of the work of the office, and the second a detailed statement of the work of the various divisions. The first part is divided into four sections, the first of which contains a general statement of the work of the office, and the second a detailed statement of the work of the various divisions. The second part is divided into four sections, the first of which contains a general statement of the work of the office, and the second a detailed statement of the work of the various divisions.

raised on the record.

After the plaintiff had rested its case the court permitted an amendment to be made, substituting as plaintiff in the action the real party in interest. It is urged that this was error, but this court decided directly to the contrary in Joseph Redlowski v. Crossfeld & Roe Co., 192 Ill. App. 534. We adhere to the law as there announced.

It is also urged that the sales order was a valid contract, binding on both parties, and that it could not therefore be modified without the consent of both. It was the duty of the trial court to construe this alleged contract as it was in writing, and we think the court properly held that because of its uncertainty, vagueness, indefiniteness, and lack of mutuality, it did not constitute a binding and valid contract. We have examined it and agree with the construction put upon it by the trial court. If we are correct in this conclusion, it is unnecessary to discuss other points raised by the appellant based upon the opposite theory.

The instruction for plaintiff was not erroneous, and the judgment entered upon the verdict is affirmed.

AFFIRMED.

McSurely, P. J., concurs.

valued on the record.

After the plaintiff had noted the case the court

permitted an amendment to be made, substituting an affidavit in

the action the real party in interest. It is noted that this

was done, but this court should direct to the contrary is

James v. ...

We adhere to the law as stated above.

It is also noted that the value of the property was a value

of the property, and that it was not the property of the

party to the action, but the property of the party to the

action, and we think the party properly held the property of

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119 - 27953

JOHANNA BIDLAS,  
Appellee,

vs.

ALBERT BIDLAS,  
Appellant.

APPEAL FROM CIRCUIT COURT OF  
COOK COUNTY.

220 I.A. 641<sup>2</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a decree entered in favor of the complainant upon a bill brought for separate maintenance.

The case was heard by the chancellor in open court upon the amended bill and the answer of the defendant to the original bill, which answer by order of the court was allowed to stand as his answer to the amended bill. The decree finds that the court has jurisdiction of the parties and subject-matter, "and that the allegations contained in said amended bill of complaint are true and that said Johanna Bidlas, the complainant, without her fault is now living separate and apart from her husband, the said Albert Bidlas, and that the equities in this cause are with the complainant."

The case having been tried in open court upon oral testimony, it became the duty of the complainant to preserve the evidence either by a certificate thereof or by specific findings recited in the decree. There is no certificate of evidence and the only findings of fact are as above recited. That such recitals are simply conclusions of law and not such findings of fact as will sustain a decree, has been specifically held in the recent case of French v. French, 302 Ill. 152. In conformity

ALBERT BILKAS,  
 Defendant,  
 vs.  
 ALBERT BILKAS,  
 Plaintiff.

115 - 116

MR. JUSTICE MONTGOMERY DELIVERED THE VERDICT OF THE COURT.

This is an appeal by the defendant from a decree entered in favor of the complainant upon a bill brought for specific performance.

The case was heard by the complainant in open court upon the amended bill and the answer. It is the defendant's original bill, which answer by order of the court was allowed to stand on the answer to the amended bill. The record shows that the court has jurisdiction of the parties and subject-matter, and that the allegations contained in said amended bill of non-performance are true and that Albert Bilkas, the complainant, without her fault is now living separate and apart from her husband, the said Albert Bilkas, and that she seeks in this case one with the complainant.

The court having been called in open court upon oral testimony, it became the duty of the defendant to produce the evidence either by a certificate to do so or by specific findings recited in the decree. There is no recitation of evidence and the only findings of fact are as above stated. That such findings are simply conclusions of law and not facts is plain from the fact that the complainant, who has specifically held in the second case of Albion v. Albion, 100 Ill. 112, is conclusively

with the ruling of the Supreme Court as there announced, we are compelled to reverse this decree and remand the cause.

REVERSED AND REMANDED.

McSurely, P. J., concurs.

and the following words are found in the list of the

list of the names of the persons who have been

mentioned in the list.

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137 - 27971

THOMAS R. WEDDELL,  
Appellee,

vs.

PETER BOBENG,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment for possession and for damages in the sum of \$591.60. The cause was tried by a jury. At the close of all the evidence the plaintiff requested an instruction in its favor, which was denied. The jury returned a verdict in favor of the defendant. The plaintiff then moved for judgment non obstante verdicto, which the court granted and the judgment for possession and damages was thereupon entered.

The only alleged error which it will be necessary for us to consider is that the court erred in entering judgment for the plaintiff notwithstanding the verdict of the jury in favor of the defendant.

The plaintiff in his statement of claim alleged that the defendant unlawfully held possession of premises known as 4121 West North avenue, Chicago, Illinois, and also claimed for double rent for these premises covering the period from August 1, 1917, to November 30, 1921.

The defendant filed an affidavit of merits, which on motion of plaintiff was stricken, and upon leave given afterwards filed an amended affidavit of merits. His defense was therein stated to be that he was in possession of the premises under a contract with plaintiff, in and by which the plaintiff agreed to sell and defendant to buy these premises. The supposed contract

CHIEF OF POLICE

NEW YORK

NY

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111 - 111

NEW YORK

This is an appeal by the defendant below from a judgment for possession and for damages in the sum of \$100.00. The cause was tried by a jury. At the close of all the evidence the plaintiff requested an instruction in its favor, which was refused. The jury returned a verdict in favor of the defendant. The plaintiff then moved for judgment and a writ of habeas corpus. The court granted the judgment for possession and damages and the writ of habeas corpus.

The only alleged error which it will be necessary for me to consider is that the court erred in entering judgment for the plaintiff notwithstanding the verdict of the jury in favor of the defendant.

The plaintiff in his statement of claim alleges that the defendant unlawfully took possession of premises known as 4321 West 125th Street, Chicago, Illinois, and also claimed for damages from the time possession covering the period from August 1, 1917, to November 30, 1917.

The defendant filed an affidavit of denial, which on motion of plaintiff was withdrawn, and upon leave given afterwards filed an amended affidavit of denial. His defense was therein stated to be that he was in possession of the premises when a contract with plaintiff, in and by which the plaintiff agreed to sell and deliver to him certain premises. The contract provided

was set up in haec verba and is as follows:

"Chicago, Dec. 5, 1911.

I hereby agree in consideration of Fifty Dollars in hand paid, and the further consideration of \$450, to be paid within five days after the abstract has been examined and approved, and further consideration to assure the payment of the balance of \$1238.90 within five years from date of approval, with interest at five per cent. to sell and convey to Peter Bobeng all my right, title and interest in Lot 36, in the Davenport Subdivision of Sec. 3, 39, 13.

T. R. Weddell."

The affidavit further alleged that defendant had continued in possession under this contract from thence hitherto; that plaintiff had at various times after the execution of the contract, told the defendant that he was having difficulty in getting an abstract for the real estate at a reasonable price; that defendant had agreed to give the plaintiff all the time he needed to procure the abstract; that the delay in the completion of the contract was solely on account of the failure of the plaintiff; that the defendant has always been ready, willing and able to pay the purchase price mentioned in the contract and is now ready and willing so to do, but that plaintiff refused to give the defendant the abstract to the premises; that the defendant was not in possession under lease and was not indebted to the plaintiff for rent in any amount.

The evidence as taken upon the trial disclosed without contradiction that these premises and this alleged contract had been the cause of a number of law suits between these parties.

December 5, 1911, defendant Bobeng filed a bill in equity in the Circuit court of Cook County against the plaintiff, in which he asked the specific performance of this contract. A demurrer was interposed and was sustained. Leave was given Bobeng to amend in ten days, at the end of which time he voluntarily dismissed his suit.

August 18, 1915, the plaintiff Weddell brought suit







in the Municipal court against defendant Bobeng to obtain possession of the premises. When the case came on for trial defendant Bobeng, on the theory that he was in possession of these premises as a tenant of plaintiff from year to year, said that a thirty day notice which had theretofore been served upon him was for that reason insufficient. The defense was sustained and the court entered a finding and final judgment in favor of the defendant and against the plaintiff on that issue. A second notice was served on defendant by plaintiff on July 30, 1917, whereupon defendant filed another suit for the specific performance of the contract, etc. This bill was afterwards amended and upon hearing before the chancellor the same was dismissed for want of equity. An appeal was prayed to the Appellate Court for the First District, which was allowed, but never perfected.

December 2, 1921, the defendant sued the plaintiff at law in the Municipal court of Chicago, claiming damages in the sum of \$8,250.00, which suit was pending and undisposed of at the time of the trial of the present action.

The uncontradicted evidence shows that in the suit for possession in which a judgment was entered September 23, 1915, the defendant interposed the defense that he was in possession under a tenancy from year to year and succeeded upon that issue, and upon a finding in his favor secured a judgment against the plaintiff. It is the contention of the plaintiff that the defendant in this suit is estopped by the finding and the judgment rendered in that suit; that it having been once adjudicated that he was in possession as a tenant and not as a purchaser, he will not be allowed, in a suit concerning the same premises and between the same parties, to deny that he is such tenant and claim that he is a purchaser. We think this point is well taken. The law on the subject has been exhaustively discussed in the case of



Hanna v. Read, 102 Ill. 596, and the court there stated that:

"Where some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. This species of estoppel is known to the law as an estoppel by verdict and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as matter of defense.\*\*\*<\*\*\*\*\*"

And to the same effect are Mahannah v. Mahannah, 292 Ill. 134; Noyes v. Kern, 94 Ill. 521, Ackley v. Westervelt, 86 N. Y. 448; Theological Seminary v. The People, 189 Ill. 439; Pepper v. Pepper, 24 Ill. App. 316.

Such being the law, and the evidence being as heretofore stated, we have no doubt that the motion of the plaintiff for an instruction to the jury in his favor should have been allowed. The only difficulty in the case arises out of the rules of law which have been laid down in regard to the circumstances under which a court may enter a judgment non obstante veredicto. The rule applicable in such case has been stated by this court in Aldrich v. Mathias, 141 Ill. App. 590, as follows:

"Where there is a good plea or answer filed, the plaintiff is not entitled to a judgment non obstante veredicto. 11 Ency. P. & F., 915; Ambler v. Whipple, 139 Ill. 311, 322. Since a judgment non obstante veredicto must be granted, if at all, upon the record, it follows that the evidence cannot be looked to in determining a motion for such judgment. 11 Ency. P. & F., page 917; and in reviewing ruling of the trial court on a motion for judgment non obstante veredicto, this court can not look to the evidence in the record to determine whether or not it sustains the judgment entered on such motion. The pleadings are the only part of the record which are relevant to that question."

We agree with the contention of the appellee that the contract set up in the amended affidavit of merits is so ambiguous as to be unenforceable either at law or in equity. Such it would seem from the record has been the decision of the chancery court in at least one of the suits which defendant brought for specific performance of this contract.







And although no authorities are cited exactly to the point, we are constrained to hold that where, as here, it clearly appears from the record that a defendant is estopped to set up the supposed defense stated in his plea, and where it clearly appears on the record that a motion for an instructed verdict in favor of the plaintiff ought to have been given, the entering of judgment non obstante veredicto after a verdict of a jury in favor of the defendant if erroneous is harmless error, for which this court will not reverse upon appeal. The judgment of the trial court is therefore affirmed.

AFFIRMED.

McSurely, P. J., concurs.

And although no application was filed merely to the  
point, we are constrained to hold that where, as here, it clearly  
appears from the record that a defendant is intended to set up  
the evidence against himself in his own defense, and that it clearly  
appears on the record that a motion for an instructed verdict is  
favor of the defendant, the court is bound to grant it, the entering of  
a verdict for a verdict of a jury in  
favor of the defendant is erroneous is harmless error, for which  
this court will not reverse upon appeal. The judgment of the  
trial court is hereby affirmed.

WITNESSES

WITNESSES, J. J. ...

OPINION FILED MARCH 28, 1923.

142 - 27977

JACK MEDICINI,

Appellee,

v.

JACOB ARNOLD,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

229 I.A. 641<sup>4</sup>

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an appeal from a judgment recovered by the plaintiff Medicini, in a forcible entry and detainer proceeding awarding him possession of the premises involved. It appears from the evidence that the plaintiff is the owner of a building containing two stores, one of which he occupies himself, and the other of which has been occupied by the defendant Arnold, as a tenant from month to month, ever since the plaintiff purchased the property some two years prior to the institution of this suit. It further appears from the evidence, that the defendant occupies the store in question, as a barber shop, using the front portion of the store as a shop and the rear part as living quarters.

The only contention made by the defendant in support of his appeal is that the trial court erred in denying his motion for a stay of execution, under Section 18, chap. 87 of our statutes. Apparently the trial court denied the motion for a stay of execution on the ground that at the time the motion was made, the rent which had accrued and was due, had not been fully paid up. The defendant contends that this is not a sufficient reason for deny-

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ing his motion, as he was willing to pay the rent then due, and which would become due, up to the end of the month in which the motion was made, and give bond for the payment of all rent that would become due during the period of the stay.

In our opinion these matters are immaterial. To hold that the trial court erred in denying the defendant's motion, on the record before us in the case at bar, it would be necessary to hold that, regardless of the circumstances involved, a defendant in a forcible entry and detainer proceeding would be entitled, as a matter of right, the issues having been found for the landlord, to a stay of execution under the Section referred to. Such is not the law. The statute provides that the court may grant a stay of execution for a period not to exceed six months, in its discretion. The exercise of discretion depends upon the circumstances involved. There is not a single circumstance disclosed in this record, indicating any reason why the court should so exercise its discretion on this motion, in favor of the defendant. The defendant was occupying the premises from month to month. The termination of his lease on April 30, was indicated in the notice <sup>served</sup> on him on February 25. If there was any reason why the termination of his tenancy at that time would be a hardship on him, he did not see fit to disclose it to the court. The plaintiff made out his case and was entitled to possession. The defendant put in no testimony, and merely made his motion for stay of execution, without suggesting any reason why the court should exercise its discretion in his behalf.

The motion was properly overruled and the judgment of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

[illegible]

to be applied, and the following provisions are hereby made:

• *Journal of the American Medical Association*, 271: 1000-1001, 1994

1957-1958, 1959-1960, 1961-1962, 1963-1964, 1965-1966, 1967-1968, 1969-1970, 1971-1972, 1973-1974, 1975-1976, 1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 2689-2690, 2691-2692, 2693-2694, 2695-2696, 2697-2698, 2699-2700, 27

28630

PEOPLE OF THE STATE OF ILLINOIS,  
Appellees,

vs.

EDWARD FORKEL et al.,  
Appellants.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

22970-911  
PER JURIAM.

In the above case The People of The State of Illi-  
nois, appellees, by the Attorney General, has moved that the  
judgment or decree of the trial court be affirmed for the  
reason that the appellants have not filed the record in this  
case on or before the second day of the present term of this  
court, as required by the statute. Section 100, chapter 110,  
Practice act, provides that under such circumstances the  
Appellate court may affirm the judgment or decree, and this  
is accordingly done, following the reasons set forth in  
City v. Salnitaky, 210 Ill. App. 159.

AFFIRMED.

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PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

JOHN J. JOHNSON,

Plaintiff in Error.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

229 I.A. 641<sup>6</sup>

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, Johnson, seeks to reverse a judgment of the Municipal Court of Chicago, finding him guilty of keeping intoxicating liquor for sale, in violation of the Illinois Prohibition Act, and fining him \$500.00 and costs. The People have filed no brief in this court.

A number of contentions are made in support of this writ of error but it will be necessary to consider only one of them. The information on which these proceedings are based, sets forth the charge against the defendant, and in the body of the information this charge purports to be made by one, Erick Hernicy, whereas, the information is signed by "Alex Helmeez". The oath following the information recites that "Erick Hernicy, being first duly sworn, on his oath deposes and says that he resides at ; that he has read the foregoing information by him subscribed and that the same is true." Appended to this affidavit appears the name of "Alex Helmeez". Of course this information is wholly insufficient to support the judgment. As it stands, the information is



neither made by the person swearing to it, nor is it sworn to by the person making it. If wholly false, perjury could not be predicated upon it as to either of the parties whose names appear upon it.

On this state of the record, the trial court erred in overruling the defendant's motion in arrest of judgment. The judgment of the Municipal Court is therefore reversed.

JUDGMENT REVERSED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

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31 - 27474

Opinion filed Apr. 11, 1923

MOTOR LIST COMPANY,  
a corporation.

Defendant in Error.

v.

DIAMOND T. MOTOR CAR CO.,  
a corporation.

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

229 T.A. 642<sup>1</sup>

MR. PRESIDING JUSTICE THOMSON delivered the opinion  
of the court.

By this appeal, the defendant, Diamond T. Motor Car Co., seeks to reverse a judgment for \$1150.00 recovered against it in the Municipal Court of Chicago, by the plaintiff, Motor List Company, a corporation. The issues were submitted to the court, a jury having been waived. The case was tried on a statement of claim for goods, wares and merchandise, sold and delivered, and for work, labor and material furnished to the defendant, and an affidavit of merits setting forth that "this plaintiff never furnished to the defendant, any goods, wares or merchandise, or work, labor or material, and that "defendant never had any contract or other relations with this plaintiff and that defendant is not indebted to this plaintiff."

In support of its appeal, the defendant urges a number of points, but in our view of the case it will be necessary to consider only one of them. It is urged that the trial court erred in finding the issues for the plaintiff because the proofs submitted by the plaintiff failed to establish the fact that it had fulfilled the contract, and was therefore entitled to the



consideration therein stipulated and particularly, that the plaintiff failed to prove that it had made deliveries of the lists contracted for, within a reasonable time, and, as to certain other lists, that the evidence showed that they were materially incomplete.

The plaintiff was in the business of furnishing automobile statistics. In the winter and spring of 1918, the parties had certain correspondence relating to the plaintiff furnishing the defendant certain statistical service, covering all solid tire commercial trucks purchased in each county in the United States, and also a list of Diamond T. truck owners, with truck numbers, in a restricted list of designated states. In commenting upon this proposed service by the plaintiff, it wrote the defendant explaining that the service relating to commercial trucks in all states, contemplated "twelve reports for each county in each state, one for each month." In communicating on the proposed service relating to the Diamond T. truck statistics, the plaintiff wrote the defendant, in April 1918, that the factory number of each machine could be given on cars in all states except Rhode Island, Maryland, and Delaware and that the list of these owners would be made up from the registrations complete to the end of 1917, except as to Pennsylvania; that one-third of this list could be made up at once and would be complete by July 1.

Under date of April 30, 1918, the defendant gave an order for "twelve monthly reports, starting January 1, 1918, showing total number of trucks, solid tires, purchased in all counties of all states. The charge for this service is to be \$1,000.00 per annum." This order was forwarded with a letter from the defendant referring to the order as one for "the month-

These two groups of people are the only ones who are not in the same position as the others. They are the only ones who are not in the same position as the others. They are the only ones who are not in the same position as the others.

The Committee on the Judiciary of the Senate has the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the proposed amendment to the Constitution of the United States, and to inform you that the same has been referred to the Committee on the Judiciary of the Senate for their consideration.

On the 10th of April, 1900, the following was received from the United States Marshal, New York City:



ly service which you furnish." Under date of May 25, 1918, the defendant gave the plaintiff an order for a "complete list of Diamond T. truck owners with respective truck numbers" in certain designated states, this service to cost \$100.00. In acknowledging receipt of the former order, plaintiff advised the defendant that it would begin delivery of the statistics called for about June 1. Later that month, the defendant wrote the plaintiff saying it was in great need of the general statistics,-- that it wanted reports on every month's purchases commencing with January 1, 1918, and expressing surprise that there should be any delay in sending reports for January to April inclusive, if plaintiff had been furnishing the service to others, as its advertising represented. The plaintiff replied, calling attention to "the fact that we were not to begin delivery on this until after the first of June", and expressing the belief "that these will come to you in a very satisfactory manner, as soon as we are able to begin delivery."

The record shows that the plaintiff supplied the general truck statistics called for by the order of April 30, all the way from four to eight months after the months which they covered. On August 26, 1918, the plaintiff had sent the defendant no statistics for the month of January on any of the counties in seven states and none for the month of February on any counties in fourteen states. The defendant wrote the plaintiff on that date, in reply to an invoice the plaintiff had sent covering January and February service, complaining of the service and contending it could not be called upon to pay for such incomplete service. The plaintiff replied that certain missing January reports were on the way; that certain missing February reports had been sent and that the balance of the reports for these two months would soon be completed and added. "many reports for March and April will be

if service under the "War Service" Act of 1915.

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shipped during the next ten days, as we are now rapidly getting caught up."

Much correspondence passed between the parties prior to this, in June, July and August, in which the defendant complained of the service being rendered, both as to the time of delivery of the statistics and also the truck numbers were not being furnished in the statistics which were being delivered. Under date of August 6, plaintiff wrote it would probably be October 1, before it had everything complete to the end of June; that July figures would be furnished during October, - also part of August, and that this would be as near up to date as the statistics to be furnished could be.

Under date of August 8, the defendant wrote the plaintiff cancelling its order for the general truck statistics. The plaintiff wrote the defendant in reply, to the effect that it had gone to a considerable expense, "primarily on the strength of your order, and will naturally expect you to keep your part of the contract \* \* \* You may be sure that we will continue to get caught more nearly up to date with each succeeding month." The plaintiff continued to send the defendant reports from time to time and the latter repeatedly reminded the plaintiff that the order had been cancelled. Some of the reports were returned by the defendant and others were held, subject to plaintiff's disposition or order. Under date of August 28, the defendant refused to pay for any lists, "not supplied within thirty days after the close of the current month," that is, defendant refuses to pay for the service unless the statistics for each month were delivered within thirty days after the close of such month.

Under date of October 8, the plaintiff, sent the de-







endant a bill for \$100.00 for the statistics furnished as to the Diamond T. trucks. Payment was refused on the ground that the statistics furnished were materially incomplete. Plaintiff replied to the effect that it had furnished, "50% of the names available." On October 18, defendant advised plaintiff that there were 471 Diamond T trucks in operation in the states, which plaintiff was to cover by the statistics it was to furnish, whereas the statistics submitted up to that time on those states by the plaintiff, referred to only 210 trucks or less than one-third of the number being operated in those states.

It appears from the evidence that the plaintiff had been compiling passenger automobile statistics for a number of years, but that the year 1918 was the first year they had furnished statistics on trucks.

The order for the general truck statistics given April 30, 1918, called for "twelve monthly reports", for which the defendant was to pay "\$1,000.00 per annum." No time for the delivery of these reports was specifically set forth in the order. The evidence shows that the plaintiff held itself out as giving its customers "the very best, latest and most authentic data." It advertised that "timeliness is a prime necessity in most lines" and its advertisements gave certain prices "for complete state lists to date." The order given by the defendant and accepted by the plaintiff and which the latter attempted to carry out, called for the submission of the reports contracted for within a reasonable time. This fact is not controverted by the plaintiff, but the latter argues that this "was a question of fact, depending upon the circumstances, and the court held that they were so delivered." Counsel for plaintiff further contend that it is unnecessary to discuss the evidence on this question, - that the



nature of the business, the difficulty and delay in obtaining the required information, justified the conclusion that the deliveries were made within a reasonable time. With that contention we are unable to agree. The plaintiff sued for the full contract price stipulated in the contract for the general statistics and also the contract for the Diamond T. statistics. To make out its case, it was incumbent upon the plaintiff to show by a preponderance of the evidence that it furnished the statistics called for by these contracts within a reasonable time. This, in our opinion, it failed to do. All the plaintiff showed was that the work was done "as fast as we could handle it"; that they were adding to their force from time to time and improving their service as fast as they could; that 1918 was the first year they furnished truck statistics; that they had furnished passenger car statistics before; that they did not have to put on any additional employees to furnish the truck statistics; that this involved no extra work; that they hired four more girls in 1918 because there were more registrations that year; that they were endeavoring to improve their service by putting on more men. All this evidence was to no purpose on the question of delivery within a reasonable time. That the defendant sought this statistical information for use in its business is, of course, apparent. That the plaintiff held itself out as being in a position to compile and furnish it promptly, is shown by the evidence. The plaintiff could not fulfill its contract to furnish this information, by delivering it at any time in the future as it might suit its convenience. Deliveries were called for within a reasonable time. Indeed, the order as given and accepted, calls for "monthly" reports. At no time did the plaintiff even pretend to submit reports monthly. It was con-







tinually endeavoring to excuse its admitted defaults and delays. The reasonableness of the time of such deliveries as the plaintiff made under its contract depended on all the circumstances involved. Remunism v. Scholtz, 182 Ill. App. 238; Schully v. Hamilton, 118 Ill. 192; Jackson v. Lonlin, 80 Ill. App. 538. The question of what was a reasonable time to make deliveries under this contract was capable of proof but the plaintiff submitted no competent and material evidence on that question.

One element of the reasonableness of the time for the submission of these reports of any month, was the time it would take to gather and compile the statistics for that month with the use of an adequate force. There is no evidence in the record as to what that was. The case comes to this. The plaintiff had been compiling statistics on passenger cars. In 1918, it attempted the compilation of statistics on commercial trucks also. Its force was not materially increased. It took on contracts for "monthly reports" on commercial truck statistics and got the reports out on these contracts "as fast as we could handle them." That proved to be anywhere from four to eight months after the months to which the statistics applied. But as to whether that was a reasonable time, the record does not show anything. From such evidence as is in the record, the contrary would seem to be the case. Such execution of the work was not up to the plaintiff's representations in its advertising. According to that advertising the plaintiff let it be known that it realized that "timeliness is a prime necessity in most lines", and defendant endeavored to show that was the case with its line and that these reports coming from the plaintiff four to eight months late were useless. As to the contract for statistics covering Diamond T. trucks in service in certain designated states,



the plaintiff does not pretend that it furnished beyond any of that information. That it failed to fulfill its contract is apparent.

For the foregoing reasons we are of the opinion that the plaintiff failed to make out a case and the judgment should have been for the defendant. The judgment of the Municipal Court, for the plaintiff, is therefore reversed.

JUDGMENT REVERSED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

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Ministry of Finance

Ministry of Finance



44 - 27505

CITY OF CHICAGO.

Appellee.

APPEAL FROM

v.

MUNICIPAL COURT

BERNARD MARTI, JR.,

OF CHICAGO.

Appellant.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

By this appeal the defendant, Marti, seeks to reverse a judgment of the Municipal Court of Chicago, finding him guilty of making an indecent exposure of his person, and fining him \$100.00 and costs. The defendant waived a jury and the evidence was passed upon by the trial court, without a jury.

The complaint filed in this case was subscribed and sworn to by a Mrs. Harding, the mother of the complaining witness, Ellen Milton. It set forth that on the 13th day of September, 1921, at the City of Chicago, the defendant "did then and there make an indecent exposure of his person." This complaint sufficiently set forth the cause of action. It was not necessary, as the defendant contends, that the complaint set forth the manner in which he made the indecent exposure. No plea of the defendant appears in this record, but where the defendant fails to plead but proceeds to trial without a plea, he will be deemed to have waived it.

After the complaining witness had begun to testify, it appeared that the occurrence complained of did not happen on the 13th but on the 9th of September, whereupon, the court

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### Conclusions

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

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and the soldiers were ordered to fire the first round, at least.

[illegible]

...the fact that the ...

directed that the complaint might be amended to that effect, on its face, which was done. The defendant now points out that after this amendment was made on the face of the complaint, it was not re-sworn to by Mrs. Harding, citing 16 C.J. 297, where it is stated that "After making material amendment, even when done with consent of the defendant, the complaint must be verified before any further step is taken under it" and also citing, People v. Belotnicki, 246 Ill. 125. In our opinion the point thus made has no bearing on the situation presented by the facts in the case at bar. No objection was raised by the defendant at the time of this change involving the facts as set forth in the complaint. The defendant did not move for a continuance, he did not claim any surprise, nor did he enter a motion to quash, or raise the question of the necessity of a reverification of the complaint, but he proceeded to trial on the merits, without any objection whatever. In that situation, he will not be heard to raise the point now.

The main contention of the defendant is to the effect that the evidence is insufficient to support the conclusion of the trial court, finding him guilty. The question thus presented is one which is not free from difficulty.

The complaining witness, Ellen Milton, was a girl 17 years of age; five feet three inches tall and weighing 130 pounds. She attended the Lake View High School, and in September, 1921, she was in the third year class in that school. The defendant was a man 32 years of age, and at the time of the trial had been married 9 years. He was a decorator, and with a number of other men in the same employment, was engaged in doing some painting and decorating in the school building, and had been so engaged for some weeks prior to the occurrence complained of.

The following information was obtained from the records of the  
 Federal Bureau of Investigation, Department of Justice, Washington, D.C., dated  
 January 10, 1962, and is being furnished to you for your information.  
 The records of the Federal Bureau of Investigation, Department of Justice,  
 Washington, D.C., show that on January 10, 1962, the following information  
 was received from the Federal Bureau of Investigation, Department of Justice,  
 Washington, D.C.:

1. The main purpose of the study is to determine the effect of the independent variable on the dependent variable.

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, for the year ending June 30, 1900:



In commenting on the evidence, the defendant contends that there were many contradictions in the testimony of the complaining witness, and that one of these occurred at the time when she first gave the time of the occurrence as was originally alleged in the complaint, namely, as the 13th of September, and, after the officer who was present while she was testifying, spoke up and stated that the occurrence had happened on the previous Friday, she so testified and gave the date as the 9th. However, we do not consider this contradiction warranted, from her testimony as we find it in the record. She was asked, referring to the defendant, when she saw him "last", and she said: "Yesterday (Tuesday) at school, between 9 and 10 o'clock." This, of course, is not giving the time of the occurrence, but refers to the time when she last saw the defendant, - presumably when she identified him at the time he was arrested. But whether this presumption is warranted, is immaterial. There is nothing to indicate that when she last saw him, was at the time of the occurrence in question. She testified that this occurrence happened "last Friday, the 9th, between 8:15 and 8:30"; that the defendant was standing in what she referred to as an alcove, which was an entrance from a hallway onto the balcony of the Assembly Hall of the school, on the second floor. There were some lockers in this second floor hallway, and Ellen had gone to one of these lockers, to leave her school books. She testified that she told nobody of the occurrence until she reached home, when she told her grandmother about it. Ellen's mother, Mrs. Harding, is a business woman and she did not return until evening, when, according to Ellen's first testimony, the grandmother told her about it. The complaining witness was later recalled to the stand and testified that she first saw the defendant as she was going to her locker to put her books in it; that he was then walking toward one of the doorways leading



to the alcove, and he smiled at her; that she put her books in the locker, turned around, looking for some friends she was expecting, and saw him; that "he had come into one door and gone across and gone to the other side" and was in the entrance to the balcony; that no one else was in that hallway; that "he had walked across and he came out and shuffled his feet to attract my attention and I turned around to look for my girl friends. When I heard his feet I turned to see who it was. Of course as soon as I saw him I got out of the hallway." The evidence shows that there were two entrances from this second floor hall to the balcony of the Assembly Room, and apparently the testimony of the complaining witness is to the effect that the defendant smiled at her as she was putting her books in the locker; that he passed through one of these doorways leading to the Assembly Room, and then went across through the balcony and came out the other door, into the hall, where the complaining witness was, and then exposed himself as she charges.

The complaining witness testified that she was sure that the defendant was the man; that she could not be mistaken; that she never saw him before that time; that after she went on her way, she saw him walk around the building and go into the men's toilet room; that he had on dirty white overalls; that she told her grandmother first when she got home, about 3:30, and her mother as soon as she got home. She further testified that other persons had made indecent exposures of their person in her presence, on two previous occasions, one three or four years before, and the other time about two years before, but that on neither of these occasions was the man arrested. She was asked if she went into the Assembly Room at the time this happened and she said she did not, that there were men decorating in there,-







"I saw that man, (the defendant) go in there and he came out the other doorway."

The record shows that after some testimony had been given the case was continued several days, and when the hearing was resumed, the complainant was again on the stand testifying, and on some further examination by counsel for the defendant, she testified that when she left the court room, at the close of the prior hearing, she left with her mother, and that nobody else was with her; that the policeman who made the arrest and who was in the courtroom, was not in her home on the day of the prior hearing; that she went to school that day after the hearing and that her mother went with her, but that the policeman was not there. It would seem from the record that after this testimony, there was some talk between the court, counsel, and the policeman, and it was shown that the fact was that the police officer accompanied the complaining witness and her mother from the court room, at the close of the prior hearing. The court then asked the complaining witness: "Do you remember now that the police officer went out with you?" She then testified that she did; that her mother was very nervous; that the police officer went over to the house with her but did not stay very long; that he just went up on the steps until she got a bite to eat and she then went over to school; that he left with her and her mother, and after she had a bite to eat he went over to the school with her. She further said: "When I said before, he didn't go with me, you said policeman,- I call him a detective." Counsel for the defendant then said: "Didn't I ask you if anyone went with you?" and she answered that she did not understand.



The defendant testified that on Friday morning, the 9th of September, which was the Friday prior to the hearing, he reached the high school shortly before 8 o'clock, and entered the building through the Ashland Avenue entrance. The high school is located on the northeast corner of Irving Park Blvd. and Ashland Ave. There are entrances on both sides. The entrance on Irving Park Boulevard is at the south end of the building. The complaining witness, Ellen Milton, entered the school that morning at this entrance, and, according to her testimony, went directly up to the hallway on the second floor at that end of the building, to put her books in the locker. The building is about 400 feet long, from south to north along Ashland Avenue, and the entrance, on that side, is about at the middle of the building. The defendant testified that he entered the building at this entrance, as usual, and went down into the basement to the room where the men engaged in the painting and decorating, kept their overalls. There he put on his overalls and proceeded to the engine room, which was in the basement at the south end of the building, where he had been working the afternoon of the previous day; that he worked in this room that morning, continuously from 8 o'clock until ten, when, upon finishing the work he had to do in that room, he was directed, by the foreman, to help with work which was being done in another room of the basement, at the north end of the building; that he was not on the second floor at any time on that day; that he never saw the complaining witness prior to the day before the hearing in court; that he did not expose his person as charged; that he was "thunderfounded", when he was arrested, and that he so told the officer, and further that he had never before been arrested for anything.

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*Stellio's* *Procedural Justice* (1994) and all subsequent editions.

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medical collection, but detection will be almost half, for the

doi:10.1017/S002229240000199

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1. The above information is true and correct to the best of my knowledge and belief.

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Source: *Journal of the American Statistical Association*, 1997, 92, 1033-1042.

— *Journal of the American Medical Association*, 1997; 277: 1000-1001

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1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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and we have  $\lim_{n \rightarrow \infty} \frac{1}{n} \log \frac{1}{n} = 0$ ,  $\lim_{n \rightarrow \infty} \frac{1}{n} \log \frac{1}{n} = 0$ ,  $\lim_{n \rightarrow \infty} \frac{1}{n} \log \frac{1}{n} = 0$ .

[illegible]



One, Kozirec, testified for the defendant that he was the foreman in charge of the painters and decorators at work in the high school building at the time in question; that on the morning of Friday, September 9, the defendant was at work in the engine room in the basement of the school building from 8 o'clock until about half past 9; that the witness was there for about 15 minutes, in the neighborhood of 9 o'clock and saw the defendant then; that the witness was not there before 9 o'clock but that he knew the defendant had been at work since eight o'clock, because it would take him two hours to do the work which was unfinished the day before and which he finished on Friday morning; that he, the witness, had been in the engine room and observed the progress of the defendant's work, on the afternoon of the 8th, at about three o'clock or half past three, and that the unfinished work, on the engine at that time would require another hour and a half or an hour and three quarters, or until about a quarter of 10 on Friday; that the men quit work about 20 minutes after 4; that the defendant was working on the engine pipes at the time the witness was in the engine room on Thursday afternoon, and that it would take him until quitting time to finish the work on those pipes after which, he was to paint the engine bed; that when the witness went into the engine room, around 9 o'clock, the following morning, the defendant had finished painting the pipes and the engine bed, and was at work on the engine itself, and had about an hour's work left to complete the job. He also testified that there were five men working in the assembly room Friday morning.

One Darling testified that he saw the defendant on Friday morning around 9 o'clock or 10, where they were calcimining in the forge room at the north end of the building. This



apparently was the work to which the defendant was assigned by the foreman after completing the work in the engine room. One Derby testified that on Friday morning he was working in the Assembly Room, painting the back wall on the stage; that from where he was he could see the entrances from the balcony on the second floor; that he did not see the defendant there that day; that if the defendant had been in one of the balcony entrances he could have seen him, but that he was not looking that way all the time he was at work. One Gromel testified that on Friday morning he was working on the balcony between the two entrances, from the second floor corridor, about 15 feet from each one of them; that he could see very plainly if anyone came in those entrances; that he did not see the defendant there at any time that day; that he was working on the floor of the balcony against the back wall, but he further testified that someone could have moved around behind him without his seeing him. Five witnesses testified to the defendant's good character and reputation. These witnesses had known the defendant for various periods of time, from seven years up to twenty eight years.

On this evidence we have, on the one hand, the statement of the complaining witness to the effect that the incident, which was the basis of this charge, occurred as she describes it, and, on the other hand, we have the defendant's denial; testimony to the defendant's good character and reputation; testimony by men working in the assembly room that they had not seen the defendant on the balcony, passing from one entrance to another, and testimony also to the effect that he must have been in the engine room, as he says he was, because at a given time, prior to the alleged occurrence, he had a certain amount of work to do to complete the job to which he had been assigned, and he finished it







at a time which, in the opinion of the witness testifying on the subject, necessitated his working on it all along throughout the hour from 8 to 9 o'clock.

There is no evidence directly establishing an alibi. In other words, none of the witnesses were able to state that they saw the defendant in the engine room, where he says he was, between 8:15 and 8:30 on Friday morning. The absence of witnesses to establish a direct alibi is accounted for by the testimony of the defendant to the effect that there was no one except himself in the engine room at the time in question. As the evidence in this case appears in the type written record and on the printed page, it might be said that the proof of the defendant's guilt is not sufficiently strong to warrant a finding of guilty. One who would commit such an act as was charged in this information, and testified to by the complaining witness, deserves the severest punishment permitted under the law, and, on the other hand, one should not be branded with a judgment finding him guilty of such an offense, unless the degree of proof required by the law in such cases, is fully met. Although we might be inclined to feel, from a mere reading of the testimony as it is found in the record, that it does not supply that degree of proof, we must not be unmindful of the fact that in passing on the evidence, the trial judge, who found the defendant guilty, had the benefit of observing the various witnesses as they testified, and it may well be that this opportunity were then made up for such lack in the proper degree of proof on the part of the prosecution, as it may be felt the printed record has.

The judgment of the Municipal Court is, therefore, affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.



Opinion filed Apr. 11, 1923.

BENJAMIN H. ERNLICH,

Appellee.

v.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

DOUGLAS RUG & CARPET  
CLEANERS, a corp.,

Appellant.

229 L.A. 842

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, Douglas Rug & Carpet Cleaners, seeks to reverse a judgment for \$450.00, recovered by the plaintiff, Erlich, in the Municipal Court of Chicago. The defendant was defaulted for want of an affidavit of merits, after an extension of time to file such affidavit and defendant's failure to do so. Within thirty days after the entering of the judgment the defendant moved to vacate it, and duly filed an affidavit in support of its motion. The motion was overruled.

In this court neither of the parties give any consideration to the affidavit filed by the defendant in support of its motion to vacate, nor do they discuss or consider the question of the sufficiency of the affidavit nor the propriety of the order of the court overruling the motion to vacate, so far as that order is dependent upon the affidavit filed in support of the motion. The only question discussed in the briefs filed by counsel for the respective parties, has to do with the sufficiency of the statement of claim, the defendant contending that it entirely fails to set forth a cause of action.

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Page 2

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and the plaintiff contending, on the other hand, that it is sufficient.

The statement of claim filed by the plaintiff is in the following words: "Plaintiff's claim is for the fair, usual and reasonable market value of a certain rug which was delivered to the defendant in a first class condition to be cleaned by the defendant, which the defendant returned to the plaintiff, the same rug, in a damaged condition on or about the first of May, A. D. 1921, which said rug was reasonably worth \$460.00." The statement of claim was supported by an affidavit in the usual form to the effect that there was due the plaintiff from the defendant the sum of \$460.00. From the record it appears that after the defendant had been defaulted, the court entered judgment against the defendant, on the affidavit of claim, for the amount claimed,- \$460.00.

In our opinion, the statement of claim is not sufficient to support the judgment, it being a judgment by default, based entirely on the statement of claim, and so far as the record shows, entered without any evidence being introduced to prove the damages. The statement of claim does not state that the rug was so damaged as to be of no use to the plaintiff, or that the plaintiff declined to receive it. On the contrary, it merely states that the rug was "returned to the plaintiff, \* \* \* in a damaged condition." There is no statement of the value of the rug in its damaged condition, but the statement of claim is merely to the effect that the rug "was reasonably worth \$460.00", meaning, of course, that that was the value of the rug as delivered to the defendant to be cleaned.



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For the reasons stated, the judgment of the Municipal Court is reversed and the cause is remanded to that court.

REVERSED AND REMANDED.

TAYLOR & O'CONNOR, JJ. CONCUR.

Decided to go to London, and after some delay  
 from lack of money to visit his father at home

and to see his mother

and to see his mother



Opinion filed Apr. 11, 1923.

65 - 27540

ERNEST J. BATTEN,

Appellant,

v.

CITY OF CHICAGO, et al,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

2001.1.6424

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The complainant, Batten, filed his bill of complaint as a citizen and tax payer, representing that in the appropriation ordinance for 1921, passed by the City Council of Chicago, there was an item reading as follows:

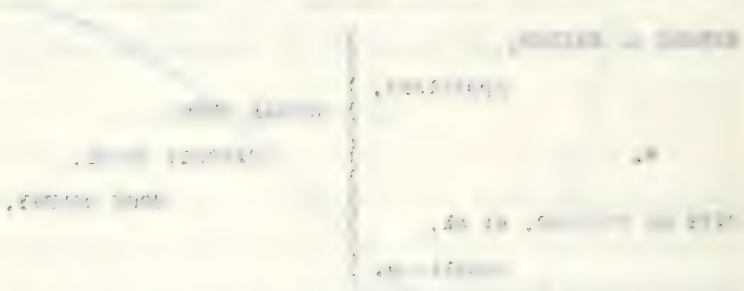
"30-A-1 - \* \* \* Sergeants of police, first grade, not to exceed 321 at \$2400. per annum. (to include present sergeants of police), 3rd grade, not to exceed 493 at \$2200.00 per annum (to include present detective sergeants, the title of said position being hereby changed to that of sergeant of police, third grade) \$1,865,000. (it being the intention to create three groups of sergeants in accordance with the following schedule:

3rd grade, \$2200.00 per annum,  
2nd grade, (after one years service at \$2200.) \$2300  
per annum  
1st grade, (after one years service at \$2300.) \$2400  
per annum."

The complainant further alleged in his bill of complaint that the office of sergeant of police, third grade, had

October 1944 New York City

Page 1 of 1



540 1. 0. 0. 0.

THE FOLLOWING IS A SUMMARY OF THE RESULTS OF THE SURVEY.

RESULTS OF THE SURVEY.

The survey was conducted in the following manner: A list of names was obtained from the records of the city of New York. The names were then divided into two groups: those who were born in the city of New York and those who were born elsewhere. The names of those born in the city of New York were then divided into two groups: those who were born in the city of New York and those who were born elsewhere.

The results of the survey are as follows: The number of names in the first group was 1,000. The number of names in the second group was 2,000. The number of names in the third group was 3,000. The number of names in the fourth group was 4,000. The number of names in the fifth group was 5,000. The number of names in the sixth group was 6,000.

The following is a list of the names of the persons who were born in the city of New York and who were born elsewhere.

The following is a list of the names of the persons who were born in the city of New York and who were born elsewhere.

never been created, but that the existing ordinance establishing a police department of the City of Chicago, provided for and created the offices of patrol sergeants, desk sergeants, and detective sergeants. The bill then set forth the various duties of desk sergeants, patrol sergeants, and detective sergeants. It then alleged that no appropriation was made in the appropriation ordinance of 1921, passed by the City Council of the City of Chicago, for detective sergeants; that defendants had paid salaries under said ordinance at the rate of \$2200.00 per annum to 493 detective sergeants, on July 16, 1921, and August 21, 1921, and that defendants intended to and had stated that they would pay said 493 detective sergeants on August 15, 1921, at the rate of \$2200.00 per annum, which, the complainant alleged would be illegal under the aforesaid ordinance "because the office of sergeant of police, 3rd grade, has never been created." Complainant prayed that defendants be restrained from certifying and paying any of the moneys appropriated under the aforesaid appropriation ordinance, to sergeants of police, 3rd grade, or to detective sergeants. The defendants filed a general demurrer to the bill of complaint and the trial court sustained the demurrer and dismissed the bill for want of equity. To reverse that decree the complainant has perfected this appeal.

In support of his appeal the complainant contends that the three classes of sergeants, detective sergeants, patrol sergeants, and desk sergeants, have entirely different duties; that in appropriating for sergeants of police, 3rd grade, the City Council attempted to create a new office, the duties of which were nowhere defined, and that inasmuch as the Council did not appropriate salaries for detective sergeants, there had





been no valid appropriation for the salaries of those officers for the year 1921, and that the Treasurer is paying the detective sergeants who were not appropriated for, out of the appropriation for sergeants of police, 3rd grade, which is an office not yet created, or, if considered as created, an office to which detective sergeants cannot be transferred without a Civil Service examination and an appointment under the Civil Service Law. In our opinion, this contention is wholly without merit.

In People, ex rel Loftus v. Frazier, et al., 214 Ill.

App. 664, a disputed question of fact was presented as to whether the relator, a detective sergeant, was employed in the same line and character of work as a uniformed lieutenant of police, and in that connection this court said: "We are unable to see any sufficient reason for holding that detective, patrol, and desk sergeants are not employed in the same line and character of work as that performed by a uniformed lieutenant of police \* \* \* while there is some difference in the duties required of the different classes of sergeants appropriated for, this difference is not of such character as would warrant a finding that each was engaged in a line or character of work different from that of the others." It was held in that case that the relator, a detective sergeant in Grade II was eligible to take the promotional examination for any vacancies there might be in Grade III, in which grade was included the position of lieutenant of police. The Supreme Court denied a petition for a writ of certiorari in that case.

In People, ex rel Walsh v. City of Chicago, et al. App. Court of Ill. First District, case No. 27452, opinion filed October 30, 1922, (not yet reported) this court referred to the Loftus case, and reaffirmed the holding made in that case, to

There are three investigations for the elimination of forest fires. The first is the prevention of fires, the second is the control of fires, and the third is the removal of fires. The first investigation is the prevention of fires, which is the most important. The second investigation is the control of fires, which is the most difficult. The third investigation is the removal of fires, which is the most expensive.

THE STATE OF NEW YORK, ss. I, the County Clerk of the County of Albany, do hereby certify that the foregoing is a true and correct copy of the original as the same appears from the records of said County.

[illegible]

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

[illegible]

the effect that "detective, patrol and desk sergeants are employed in the same line and character of work." In that case, this court held that the term "sergeant of police" included the three grades referred to. It appears that in the Walsh case the General Superintendent of Police, had assigned certain detective sergeants to duty as desk sergeants and patrol sergeants. The relator in that case stood near the head of the eligible list of those who had successfully passed the examination for appointment to the office of sergeant of police. It was the contention of the relator that the Superintendent of Police had illegally promoted these 27 persons to positions of sergeant of police, contrary to the Civil Service Law, and that such promotions should have been made from the eligible list made up of police patrolmen who had taken and passed the examination for the office of sergeant of police. It was held that in transferring 27 detective sergeants to perform the duties of desk sergeants and patrol sergeants, the superintendent of police had "neither promoted nor demoted them in the service of the City. The change did not cause them to be employed in a line of work essentially different from that in which they were formerly engaged. It did not cause a change in their salaries, and \* \* \* there is nothing in the Civil Service Law or rules of the commission that is intended to deprive the head of a department of so essential a power as that exercised when he transferred the respondents, (the detective sergeants)." It was pointed out in the course of that opinion that the appropriation ordinance passed by the City Council in 1921, (the ordinance involved in the case at bar) included an appropriation for all police sergeants, including detective sergeants, in one item. The Supreme Court has also denied a petition for a writ of certiorari in that case.



the other first "definitely" failed and that afterwards was not  
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 this would have been the language of policy making  
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In City of Chicago v. Luthardt, 191 Ill. 516, it appeared that Luthardt had been appointed under the Civil Service Law as chief clerk of the detective bureau of the department of police. He was later dismissed by the chief of police and was prevented from performing his duties until he later obtained a writ of mandamus restoring him to his office. He then brought suit against the City to recover his salary for the period during which he had been prevented from occupying his office. It appeared in that case, that no charges had been preferred against Luthardt, but that the chief of police had refused to allow him to perform the duties of his office because the City Council had failed to appropriate for his salary for the year 1908, by the name of "chief clerk of the detective bureau of the department of police," and in attempting to discontinue or abolish that office by changing the name thereof to "secretary of the chief of detectives, rank of lieutenant", without in any way changing the duties of the office and by making an appropriation of \$1500.00 for said office of chief clerk under the name of "secretary to chief of detectives, rank of lieutenant" which was the same salary Luthardt had previously been receiving as chief clerk of the detective bureau of the department of police. In affirming a judgment recovered by Luthardt, this court said in 91 Ill. App. 324, which language was adopted by the Supreme Court in the decision above cited, "we think the fact that the appropriation was made under the name and style of 'secretary to chief of detectives, rank of lieutenant', the duties of the office and the salary being the same, can make no difference."

On the authority of these decisions we hold in the case at bar that there was no merit in the bill of complaint filed by complainant; that the appropriation ordinance did not, nor did it attempt to, create an office to be known as sergeant of police



3rd grade; that all sergeants, whether patrol, desk or detective sergeants are included under the title of "sergeants of police" appearing in said appropriation ordinance, and that under the item in the appropriation ordinance, making appropriation for 493 detective sergeants, under the title of sergeants of police, 3rd grade, such detective sergeants are entitled to be paid and the proper officers of the City of Chicago are obliged to pay them, the appropriation being a valid appropriation for detective sergeants. At most, the ordinance changed the designation or title of an office already in existence, namely, that of detective sergeant, to that of sergeant of police, 3rd grade.

We find no error in the record and, therefore, the decree of the Circuit Court appealed from is affirmed.

DECREE AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.





Opinion filed Apr. 11, 1923.

71 - 27543

CO-OPERATIVE ADVERTISING CO.,  
a corporation,

Appellee,

v.

NORTHERN ILLINOIS CEREAL CO-  
PANY, a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

229 I.A. 343<sup>7</sup>

MR. PRESIDING JUSTICE THOMSON delivered the opinion  
of the court.

The plaintiff Advertising Company brought this  
action in assumpsit, seeking to recover an amount claimed  
to be due on a contract for advertising. The issues were  
submitted to a jury and a verdict was returned, finding the  
issues for the plaintiff and assessing the plaintiff's dam-  
ages at the sum of \$1385.07. Judgment was entered against  
the defendant for that amount, to reverse which it has per-  
fected this appeal.

A copy of the contract in question is attached to the  
declaration and the contract was introduced in evidence. It  
purports to be signed by the defendant, "by F. F. Ladd, Secre-  
tary." On the trial the defendant admitted the contract had  
been signed by the Secretary Company, as shown on the face of  
the contract, but denied that a contract signed by a corporation,  
by its secretary, could be given the legal effect of binding the  
corporation, without proof showing that the secretary had suffi-  
cient authority to do so. The same argument is presented in  
this court by the defendant in support of its appeal. The defend-  
ant makes a further contention to the effect that the contract



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question was cancelled and the plaintiff's service terminated, by a letter dated February 24, 1930, addressed to the plaintiff directing it to "discontinue our advertising March 1." This letter was signed "Northern Illinois Cereal Co. F. Ladd, Secretary." That Mr. Ladd was the secretary of the defendant corporation is apparent. The defendant will not be heard to say that its secretary's authority was broad enough to effect a cancellation of the contract in question, but cannot be considered by the court as being broad enough to effect an execution of that very contract, without proof. The defendant further urges on this point in its brief, which, it should be noted, fails entirely to comply with the provisions of Rule 19, of this court, that the record is without any evidence showing that the contract in question had ever been adopted or ratified by the defendant. It appears without any controversy that the plaintiff had furnished its advertising service under this contract, and the defendant had paid the plaintiff for that service, as provided in the contract, to the extent of \$1,415.93. Thus it is shown that the defendant did adopt the contract and pay the plaintiff for the service rendered by it under that contract, at the stipulated rate, up to a certain date, beyond which it refused to pay. For both of these reasons we are of the opinion that the record establishes that the contract is enforceable against the defendant.

It is apparently another contention of the defendant that the plaintiff failed to prove performance of the contract, although it is not pointed out in what respect the plaintiff so failed. An examination of the record shows evidence sufficient to establish performance.

Testimony submitted in behalf of the plaintiff was to the effect that the advertising cards, contracted for, were put

question was answered and the plaintiff's lawyer demanded  
 by a letter dated February 24, 1911, addressed to the Union  
 City Association it to "discontinue the advertising campaign."  
 This letter was signed "George Washington Smith, Jr. Esq."  
 "Respectfully," and the plaintiff at the time  
 and contended in argument. The defendant did not intend  
 to say that the plaintiff's advertising was "not" in the  
 fact a continuation of the campaign in question, but would be  
 considered by the court as being such. It is noted in  
 evidence at the trial that the plaintiff's lawyer  
 further stated that the plaintiff, when, it was in  
 fact, this plaintiff is a party to the plaintiff's letter of  
 of this date, and the court is of the opinion that  
 that the plaintiff is entitled to the same remedy as the  
 of the plaintiff. It is noted that the plaintiff's letter  
 plaintiff had intended the advertising campaign which was  
 then, and the defendant did not intend to say that  
 then, as provided in the contract, is the effect of the  
 that it is agreed that the defendant will pay the plaintiff and  
 pay the plaintiff for the entire period of 12 months from the  
 date, as the defendant was, as a certain date, began  
 which is stated in the contract. For each of these months the  
 the contract that the plaintiff's advertising was the plaintiff's  
 advertising campaign and defendant.

It is respectfully suggested to the court that  
 that the plaintiff's letter is a mere statement of the contract,  
 although it is not signed by the plaintiff and plaintiff's  
 counsel. It is suggested to the court that the plaintiff's  
 be entitled to the same.

The plaintiff's letter is dated at the plaintiff's  
 the effect of the plaintiff's letter is to be the effect of the plaintiff's letter.



up and maintained in about 1500 stores.

Apparently the defendant's main contention is that the contract was terminated as of March 1, 1919. Under the terms of the contract, the advertising services covered by it were to continue for twelve months from September 1, 1919, to August 31, 1920, for which the defendant was to pay at the rate of \$350.00 per month. The contract reserved to both parties the privilege of cancellation "at the end of six months from this date, by giving sixty days previous written notice." The contract was dated August 29, 1919. Apparently the defendant contended, in the trial court, that the contract had been cancelled by the letter of February 24, 1920, to which we have referred, and that the plaintiff was not in a position to recover any compensation under it beyond the date of March 1. The record shows that upon receipt of this notice, the plaintiff advised the defendant that it would refuse to cancel the contract because the defendant had failed to give sixty days notice and it was the plaintiff's position, upon the trial of the case, that no proper cancellation had been made and, therefore, it was entitled to recover for the full term of the contract. The trial court held, however, that the letter of February 24, 1920, above referred to should be considered as a notice of cancellation sixty days after that date. The plaintiff apparently acquiesced in that construction of the contract and the letter, and tendered a peremptory instruction accordingly, which the court gave, resulting in the verdict above referred to. It is pointed out that even on this theory the amount of the verdict is inaccurate and should have been for one dollar less than the amount actually found. Apparently this was a clerical error. This, however, is not sufficient to warrant this court in disturbing the verdict or judgment.



We find no error in the record and, therefore, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ, CONCUR.

He had no other in the same way, however, and

perhaps of the same kind as follows.

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Opinion filed Apr. 11, 1933.

LEON KLINE,

Plaintiff in Error.

v.

H. C. BAY,

Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE THOMSON delivered the  
opinion of the court.

This is an action of assumpsit, brought in the Municipal Court of Chicago by the plaintiff, Kline, against the defendant, Bay, by which the plaintiff sought to recover certain commissions which he claimed were due him for collections he had made for a pretended corporation known as the Bellman Flayer Piano Company, of which Bay purported to be the president. The action was based on Section 18 of the Corporation Act, Ill. Revised Statutes, 3.6 A. par. 2435.

The statement of claim filed by the plaintiff alleged that a license had been issued by the Secretary of State, to commissioners to open books of subscription for the capital stock of a proposed corporation, to be called the Bellman Flayer Piano Company, but that the incorporation of this Company had never been completed nor has it ever been authorized to do business as a corporation. The plaintiff further alleged in his statement of claim that he was neither an officer, director or stockholder of the company but that he had acted as its manager at the instance of the defendant Bay. He further alleged that on or

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about July 2, 1917, the said defendant, Day, while acting as president of the pretended corporation referred to, employed and requested the plaintiff to collect certain accounts which were itemized in detail in the statement of claim; that no basis of compensation had been fixed or agreed upon between the parties, but that the defendant had promised to pay the plaintiff for doing this work; that the plaintiff, pursuant to this agreement, had collected and turned over to Day, in cash and notes, the sum of \$271,282.52; that the usual and reasonable compensation for making these collections was 5% of the amount collected, and that there was, therefore, due him the sum of \$13,564.12, no part of which had been paid.

The affidavit of merits filed by the defendant set forth that he was not indebted to the plaintiff in any sum; that all matters and differences in dispute between the parties had been settled and adjusted; that the plaintiff was not entitled to any commissions on any of the items set forth in the statement of claim, "aggregating \$76,732.95"; and that the defendant did not employ the plaintiff to collect such accounts or any part of them. In the course of the trial the defendant obtained leave to amend his affidavit of merits by striking out the words "aggregating \$76,732.95."

The issues presented by these pleadings were submitted to the court and a jury and at the close of plaintiff's case the court, on motion of the defendant, directed the jury to return a verdict in favor of the defendant, to reverse which the plaintiff has perfected this appeal.





In proving up his case, the plaintiff testified that he had a talk with the defendant, Bay, about July 2, 1917, in the office of the latter; that Bay stated that it was impossible for him to make collections and get the money in as fast as they would like to have it, and that he would, therefore, like to have the plaintiff take charge of the collections; that he realized this would cost the plaintiff some money and time, but that he was willing to pay the plaintiff for it, whereupon, the plaintiff stated that he would take charge of the collections. The plaintiff further testified that in the course of this talk, Bay said that as fast as the goods were shipped out he would send invoices to the plaintiff and he wanted the plaintiff to get after them and get the money as soon as he could. Thereafter, the plaintiff received invoices from the defendant, from time to time, and made the collections as itemized in the state of claim.

It appeared from the evidence of the plaintiff, on cross-examination, that at the time the plaintiff's office was in the Republic Building in the City of Chicago, while that of the defendant was on West Lake Street in the same City; that the sign on the door of the plaintiff's office was "Bellman Player Piano Company" and that the plaintiff was doing business under that name; that Bay paid the rent for this office with checks signed, "H. C. Bay Piano Co."; that the plaintiff started to act as the manager of the Bellman Player Piano Company in April, 1917.

It appears from the record that under date of March 20, 1917, the plaintiff had entered into a written contract with the H. C. Bay Piano Co., of which the defendant Bay was president, under the terms of which Bay was to incorporate the Bellman Player Piano Company, and the plaintiff, Eline, was to market the entire output of that Company; that the H. C. Bay Piano Co. was to pay all



the operating expenses and Elise was to receive a certain commission on all sales, while the H. C. Ray Piano Co. was to take charge of all collections of accounts, from their office.

It further appears from the record that during the course of the plaintiff's direct examination, the trial judge asked counsel for the defendant if he had the contract of employment in court, whereupon, counsel said he had and handed it to the judge, whereupon, the judge apparently read the contract over to himself and handed it back to counsel. At no time was the written contract introduced in evidence. A large number of invoices were produced which the plaintiff testified he had received from the defendant, and the amounts of which he testified he had collected. Objection was made to the introduction of all these invoices, on the ground that they were immaterial, apparently by reason of the written contract, it appearing from the record that in ruling on this question the court asked counsel for the plaintiff how he got away from that contract. The plaintiff testified that he had no financial interest in the Bellman Player Piano Company; that he acted in the capacity of manager at the defendant's request. He further testified that in the course of his talk with the defendant on or about July 2, 1917, he asked the defendant if the Bellman Player Piano Company had been incorporated and that the defendant stated it had and that he, the defendant, was the president and one Tennyson was the secretary.

On cross-examination, the plaintiff was asked by counsel for the defendant how long he had been working "under such a written contract", when he talked with the defendant in July, 1917, and he answered: "Since the first of April, 1917." Further, on plaintiff's cross-examination, it was brought out







that in the course of 1917 and 1918, down to July, the plaintiff had, from time to time, submitted statements to the H. E. Ray Piano Co., or Ray as its president, covering commissions due him, based on the sales of pianos he had made, and that as he submitted these various statements he received payment of the amounts then due him for commissions; and further, that during this same period he did not submit any statement with reference to any money that he claimed was owing to him on account of the collections he had made. In other words, he acknowledged that he had been paid in full for the commissions he had earned, based on the sales, and admitted that at no time previous to starting this suit had he submitted any statement claiming that any amounts were due him for commissions based on collections. He further testified that he looked to H. E. Ray Piano Company for all commissions due him on sales and that he was paid those commissions by that Company. As above stated, he testified he had never submitted any statement to the defendant Ray, claiming there was anything due him on account of the collections, for which he was suing in this action. It further appears from the evidence that the Hellen Flayer Piano Company never had any factory and that all pianos purporting to be sold by that Company were in fact manufactured by the H. E. Ray Piano Co.

One Baer attempted to testify for the plaintiff as to what the usual, fair and customary charge was for the work of making such collections as plaintiff testified he had made, but objections interposed by the defendant to his testimony were sustained.

When the defendant submitted his motion for a peremptory instruction at the close of the plaintiff's case, the court ex-



pressed some doubt as to the propriety of that motion, without the written contract in evidence. Counsel for the defendant then contended that the evidence showed that there was a contract in writing but that it had not been produced; that it was incumbent on the plaintiff to produce his contract, inasmuch as he admitted he was working under it. This contention prevailed and the court granted the motion and instructed the jury to find the issues for the defendant. The verdict for the defendant was accordingly returned and judgment for the defendant followed.

In our opinion, the trial court erred in granting the defendant's motion for a peremptory instruction. The plaintiff's action was based on an oral contract, which he testified the defendant had entered into, purporting to act as the president of the Bellman Flayer Piano Company, a corporation, which, in fact, did not exist. The court apparently based its action, in granting the defendant's motion for a peremptory instruction, on the written contract which was not in evidence, and which should not have been considered at all.

It was alleged in the plaintiff's statement of claim that the defendant purported to act as the president of the Bellman Flayer Piano Company; that although preliminary steps had been taken to incorporate that Company, it had never been incorporated and the Company had never been authorized to do business as a corporation in this State; that the plaintiff had no interest in that pretended Company as an officer, director, or stockholder, and that he acted as the manager of the Company at the instance of the defendant Bay. All these facts must be taken as true, as they were not denied by the defendant in his affidavit of merits. The plaintiff made out a prima facie case on his testimony to the effect that the defendant, as president of the Bellman Flayer Piano







Company, had employed him to collect their accounts and that he had collected the accounts as set forth in the statement of claim. Testimony sought to be introduced to the effect that the usual, fair and customary charge for collecting such accounts was 5% of the amounts collected, was competent and proper and should have been admitted. Some of the collections involved were made in cash, some in notes, and some were accomplished by letter or telegram, while others involved visits to distant cities. Counsel for plaintiff started to interrogate his witness as to the usual and customary charge for the collection of civil accounts, and presumably would have covered all the classes of collections involved but each question put was objected to and the objection sustained. On that case, as made out by the plaintiff, assuming proper proof as to damages by the last witness referred to, the defendant's motion for a peremptory instruction should have been overruled, and defendant required to proceed with his proof in support of his defense as set forth in his affidavit of merits, to the effect that he had not employed the plaintiff to make collections of such accounts or any part of them and that the plaintiff was not entitled to any commissions on any of the items set forth in his statement of claim.

It is the contention of the defendant in support of the judgment appealed from, that the judgment should be affirmed because the evidence shows that the plaintiff took an active part in the affairs of the pretended corporation, - Bellman Flayer Piano Company, and that he was, therefore, jointly liable with the defendant for the debts incurred by the corporation. In our opinion there is no merit in that position. The statute already referred to, on which the plaintiff bases his action, provides that "if any person or persons, being or pretending to be, an



officer or agent, or board of directors, of any stock corporation, or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation, without complying with the provisions of this Act, (or) before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation, or pretended corporation." The theory of the plaintiff's case is that the defendant Ray, acting as the president of the Bellman Player Piano Company, assumed to enter into an agreement in behalf of that Company, without complying with the provisions of the Corporation Act and without securing the necessary authority to do business as a corporation, and that he employed the plaintiff to make the collections itemized in the statement of claim, and promised to pay him for that service, and that he, therefore, under the section of the statute referred to, is personally liable to pay the debt incurred in the making of that agreement or contract. In our opinion, there is no basis for the contention that the plaintiff is jointly liable with the defendant, by reason of the agreement referred to. After fulfilling his part of the contract entered into with the defendant, the plaintiff stood in the position of a creditor of the Company. He cannot be said to have acted with the defendant in creating this debt and in making this contract in behalf of the pretended corporation. Although his title was that of general manager of the corporation, the evidence indicates that he occupied the status of an employee. There is no evidence in the record to substantiate the contention of the defendant that the plaintiff was "the most active officer in the pretended corporation." So far as the evidence shows he had no interest in the corporation whatever, oth-







er than that of an employee, on a salary. He testified that when the defendant entered into the agreement, hiring him to make the collections, and promising to pay him for them, he asked the defendant if the Company had been incorporated and the defendant assured him that it had and that he, the defendant, was the president and a man named Tennyson was the secretary. The intention of the statute on which his action is based as stated by the Supreme Court in Loverin v. McLaughlin, 161 Ill. 417, was "to secure the public, dealing with corporations, against the evils of illegal or incomplete organization, and fictitious or bogus subscriptions, by placing on the managing officers or directors the responsibility of seeing to it, that the provisions of the Incorporation Act shall be fully complied with, and that the subscriptions to the capital stock be made in good faith." We do not deem any obligation to have been placed on the plaintiff in the case at bar by this statute. He was neither the managing officer nor a director of the pretended corporation. While he was given the title of general manager, the evidence shows that he was really the manager of sales, and the collector for the Bellman Player Piano Company and the W.T. Bay Piano Co. As a party to contracts for compensation for services, the plaintiff is to be considered as a member of the public and entitled to the protection afforded by the statute referred to, rather than as a member of the corporation.

A number of cases have been cited by counsel in their respective briefs. We do not consider any of them in point, as they involve situations quite different from the one involved in the case at bar.

The defendant makes several other contentions in support of the judgment appealed from, which involve a weighing of the



evidence submitted by the plaintiff in making out his case. In considering a motion for a peremptory instruction in favor of the defendant, the court may not weigh the evidence which the plaintiff has submitted. In such a situation the plaintiff is entitled to the benefit of all the evidence in his favor and all presumptions that may reasonably be drawn from such evidence. Fluym v. Ill. Cent. R. R. Co., 320 Ill. App. 564. On the material allegations contained in the plaintiff's statement of claim and not denied by the defendant in his affidavit of merits and the evidence submitted in behalf of the plaintiff, including that which was rejected but which should have been admitted, as set forth above, the plaintiff made out a prima facie case and the defendant's motion for a peremptory instruction should, therefore, have been denied.

It is urged by the defendant that this court reconsider the motion heretofore made by him, requesting this court to strike the bill of exceptions from the record. That motion was fully considered at the time it was made, and it was denied. And it will not again be passed upon at this time.

The judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

...the plaintiff is entitled to recover all his costs.  
 In considering a bill for a permanent injunction it is necessary  
 of the defendant, the court may not allow the plaintiff to recover  
 the plaintiff has established. In such a situation the plaintiff  
 is entitled to the benefit of all the evidence in the case and  
 all presumptions that are reasonably to be drawn from the evidence.  
Thompson v. Thompson, 100 Cal. 441, 34 P. 2d 441. In the foregoing  
 allegations contained in the plaintiff's statement of claim and  
 not denied by the defendant in his answer it was held that the  
 evidence submitted in support of the plaintiff, including the value  
 was rejected but which would have been admitted, as well as the  
 above, the plaintiff was not a prima facie case and the defendant's  
 answer was a necessary inference from the facts stated.  
 Answer.

It is urged by the defendant that his answer is a necessary  
 inference from the facts stated in the plaintiff's statement of claim  
 and that he is entitled to the benefit of all the evidence in the case  
 and all presumptions that are reasonably to be drawn from the evidence.  
 and that he is entitled to the benefit of all the evidence in the case  
 and all presumptions that are reasonably to be drawn from the evidence.

The defendant's answer is a necessary inference from the facts  
 stated in the plaintiff's statement of claim and that he is entitled  
 to the benefit of all the evidence in the case and all presumptions  
 that are reasonably to be drawn from the evidence.

Plaintiff's answer and cross-examination.

Answer to the plaintiff's cross-examination.



Opinions filed Apr. 11, 1923.

FRANK KREBAL,

Appellee,

v.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

FRANK Z. HANSCOM, et al on  
appeal of FRANK Z. HANSCOM,

Appellant.

229 I.A. 643<sup>3</sup>

MR. PRESIDING JUSTICE THOMSON delivered the opinion  
of the court.

By this appeal the defendant, Hanscom, seeks to reverse a judgment for \$325.00 recovered against him by the plaintiff, Krebal, in the Circuit Court of Cook County. The plaintiff has filed no brief in this court. The suit was originally begun against the State Dental Institute, a corporation, as well as the defendant, Hanscom, the latter being the president of the corporation, but it was later dismissed as to the corporation.

The plaintiff sought by this action to recover damages which he claimed had been occasioned by reason of unskillful work done on his teeth by the defendant. The case was tried on the theory that the defendant had guaranteed the work done. This work involved the extraction of some teeth and the making and fitting of a plate.

It was incumbent upon the defendant, in support of his appeal, to point out such error in the record as he claimed would warrant a reversal of the judgment. In the brief filed by the defendant, in this court, no complaint is made of the court's instructions to the jury nor is any complaint made of the rulings of the court on the admission of evidence. There

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

The following is a list of the names of the persons who were present at the meeting held on the 1st day of January, 1900, at the residence of the late Mr. J. H. Smith, at the corner of Main and Second Streets, in the city of New York.

[illegible]

is in the brief a recitation of the evidence and a brief comment on it, from which we take it that it is the defendant's position that the verdict and judgment are against the manifest weight of the evidence.

The defendant apparently contends that the evidence shows that he possessed the ordinary degree of learning and skill exercised in his profession, and that he did exercise it in this particular case. While there was evidence submitted to the jury, pro and con, as to the alleged lack of proper skill and care in the treatment of the plaintiff, there was also evidence by the plaintiff to the effect that the defendant guaranteed that the work in question would be satisfactory and that the plate which was to be made for him would fit, whereas, the contrary proved to be the case after the work was done. On the other hand, there was evidence introduced on behalf of the defendant to the effect that, not only was the work not guaranteed, but it was stipulated specifically that there would be no guarantee.

It would rather seem from the record that the defendant was in the habit of guaranteeing his work. The cashier in the office testified to giving the plaintiff a receipt, on the occasion of one of his visits, and, in this connection, she testified that she "crossed out" the guarantee in the receipt and wrote across its face "no guarantee."

The defendant further attempted to explain the fact that the plate which was made for the plaintiff did not fit (a fact which does not seem to be controverted) by showing that the plaintiff insisted upon having his plate before his mouth was ready for it, because of the recent extraction of

The first, and also the last, of the three  
letters was dated the 10th of January, 1891.  
The second was dated the 15th of January, 1891.  
The third was dated the 20th of January, 1891.  
The fourth was dated the 25th of January, 1891.

It was a copy of the second letter that  
was sent to the printer, and it was  
the original of the letter.

The printer of the letter was in New York.

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Opinion Filed April 23, 1931.

102 - 27576.

LEOPOLD COHEN IRON COMPANY,  
a corporation.

Appellee.

v.

BRIGGS & TURIVAS,  
a corporation.

Appellant.

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

*Certiorari  
denied*

229 A. 643

MR. PRESIDING JUSTICE THOMSON delivered the opinion  
of the court.

By this appeal, the defendant, Briggs & Turivas, seek to reverse a judgment for \$1351.47, recovered against it by the plaintiff, Leopold Cohen Iron Company, in the Circuit Court of Cock County. The plaintiff brought its action against the defendant for money had and received, basing it on the common counts and a bill of particulars. By its bill of particulars, the plaintiff alleged that it was the owner of a car load of scrap iron, consisting of axel turnings, said car being designated as car B. & O. 136874, which the plaintiff had shipped to Peoria, Illinois, sometime in February, 1919; that the ownership of said material remained at all times in the plaintiff, but that the defendant, without any right or authority directed the Keystone Steel and Wire Company (which we shall refer to as the Keystone Company) to unload the material from the car and take possession of it, which the Keystone Company did, the defendant wrongfully representing that it was the owner of the material; that after the Keystone Company had thus become possessed of the material in said car, it paid the defendant \$1446.53 for it, "which was the reasonable and fair price for the contents of said car."

*[Handwritten signature]*

JOHN J. [unclear]  
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JOHN J. [unclear]  
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AND RECORDS SERVICE TO MAKE AVAILABLE TO THE PUBLIC AS MUCH OF THE

Alleging that in equity and good conscience the proceeds of the contents of the car referred to, belonged to it, the plaintiff stated that its suit was brought to recover that amount.

It appears from the record that one Jeffery was in the iron and steel scrap business. He had a written contract dated November 6, 1918, with the plaintiff under which he agreed to buy and the plaintiff to sell, two carloads of steel axel turnings, at a price of \$23.75 per ton, to be delivered within 45 days to the Inland Steel Company, f.o.b. the works of the latter. It also appears that Jeffery had another written contract of the same date, November 6, 1918, with the defendant, under which he agreed to sell and the defendant to buy, two carloads of steel axel turnings, at a price of \$24.00 per ton, to be delivered within 45 days to the Inland Steel Company f.o.b. works of the latter. Further it appears that the defendant had a written contract with the Keystone Company, dated October 9, 1918, for 3,000 tons of heavy axel turnings at a price of \$24.00 per ton, plus certain items, not necessary to note here, to be delivered f.o.b. the Keystone Company's works, at the rate of 500 tons each month from October, 1918, to March 1919, inclusive. When the defendant offered this contract in evidence, the plaintiff interposed an objection which was sustained. This contract, in our opinion, was material and competent and should have been admitted in evidence.

The defendant, having its contract with Jeffery for two cars of steel turnings to be delivered to the Inland Steel Company, later requested Jeffery to divert these two cars to the Keystone Company, as it wished to apply them on its contract with the latter company. Jeffery, in turn, having his contract with the plaintiff for two cars of steel turnings to be delivered to the Inland



Alleging that in 1937 the defendant had been arrested and sentenced to a term of years for the same offense, the defendant is, according to the plaintiff, entitled to the same treatment as the defendant in 1937.

It is further alleged that the defendant was in the United States at the time of the arrest and was not a resident alien. The defendant is alleged to have been a resident alien at the time of the arrest.

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Steel Company, having received the request just referred to, from the defendant, directed the plaintiff to divert the two cars covered by his contract with it, from the Inland Steel Company to the Keystone Company. Accordingly, two cars of steel turnings were shipped by the plaintiff to the Keystone Company,- Santa Fe 79557 and U. & O. 10306. Apparently the former of these two cars was duly received and paid for under the terms of the respective contracts to which reference has been made, but the car U. & O. 10306, miscarried in some way, and was never received by the Keystone Company. These cars went forward about November 25, 1918. It appears from the evidence that Jeffery paid the plaintiff for both these cars and in turn received payment for both of them from the defendant, and later when it appeared that the Keystone Company had not received the car U. & O. 10306, Jeffery refunded to defendant the amount he had received on that car and he, in turn, was reimbursed by plaintiff to the extent of his payment to it on the car.

In the meantime, inquiries had apparently been made about the missing car, and the plaintiff had notified Jeffery that the contents of the car U. & O. 10306 had been transferred into another car,- U. & O. 136874, and Jeffery so notified the defendant. Two letters on this subject appear in the record, both written by Jeffery, one to the plaintiff and one to the defendant. The court admitted the first but sustained plaintiff's objection to defendant's offer of the second. This was error for both were admissible. The letter from Jeffery to the plaintiff was in confirmation of a telephone conversation he had had with plaintiff's president and by this letter Jeffery advised the plaintiff that he had notified the defendant that the shipment involved in car U. & O. 10306 had been transferred into U. & O.

Speed Company, located twenty miles from the town of ...  
 from the defendant, advised the plaintiff to advise the ...  
 were covered by the defendant's ...  
 twenty in the ...  
 steel buildings were shipped by the ...  
 twenty. - ...  
 twenty of these ...  
 the town of ...  
 name, but the ...  
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 about ...  
 very ...  
 payment for ...  
 requested that the ...  
 A. C. ...  
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 to the extent of ...

In the meantime, ...  
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136874, "in accordance with telephone report from you on the matter." The letter from Jeffery to the defendant, conveyed the information referred to in Jeffery's letter to the plaintiff. Both letters were dated February 13, 1919. The evidence shows that this car B. & O. 136874 was received by the Keystone Company early in February. That Company did not know who had shipped the car in to them and they could get no information on it, so they rejected it. Under date of January 30, the defendant wrote the Keystone Company a letter saying that with reference to the original car B. & O. 10306, it had been advised that the contents of this car had been transferred to car B. & O. 136874, adding "you undoubtedly have unloaded this car by this time, but if not, we would ask that you take care of same upon arrival." On February 14, 1919, the Keystone Company accepted the car B. & O. 136874, and unloaded its contents.

The defendant had sent the Keystone Company an invoice covering the original car B. & O. 10306, in December, calling for 87700 lbs. of steel turnings. The contents of car B. & O. 136874 weighed 124240 lbs. and under date of February 24, 1919, the Keystone Company sent the defendant a credit memorandum showing that the amount of the original invoice should be \$1448.53, instead of \$1022.94.

Under date of March 11, 1919, the Keystone Company paid the defendant for the contents of this car B. & O. 136874, the sum of \$1351.41, being the amount of the corrected invoice \$1448.53, less a freight charge of \$97.12. This payment was included in a Keystone Company check, drawn to defendant's order for \$15,312.88, covering a number of deliveries, one of which was this car in question. The testimony is that the Keystone Company applied this car







on the contract it had with the defendant, and it paid the defendant for the contents of this car under the terms of that contract. The testimony also is that the defendant billed or invoiced this car to the Keystone Company against that contract. Jeffery testified in response to questions put to him by the court, that he has never received any pay for the contents of this car M. & O. 136874, and that he has never paid plaintiff anything on account of the car. He further testified that the plaintiff never billed him on this car nor had he ever sent a bill to the defendant covering the car. Over the defendant's objection, Jeffery was permitted to testify that he claimed no interest in the money representing the proceeds of this car.

There further appears in the record a letter from Jeffery to the plaintiff dated March 5, 1918, in which he tells the plaintiff that he has received a communication from the defendant calling attention to the fact that car (apparently) M. & O. 10306 had been delivered neither to the original consignee, the Inland Steel Company, nor to the consignee designated in the diversion order, but through an error had gone to another concern; and that defendant had written that it had accordingly cancelled Jeffery's invoice on this car and was billing it back to him and that defendant had requested Jeffery to see that no replacement was made, as defendant was unable to accept a car of this material then. Jeffery went on to say in this letter to plaintiff that he had written a reply to the defendant calling the latter's attention to the fact that plaintiff had advised him as to the transfer of the contents of car M. & O. 10306 into the car M. & O. 136874, and that he, in turn, had notified defendant accordingly, adding that he would appreciate it if the defendant would take the matter up with the Keystone Company, asking them if the latter



car had been received and unloaded. Jeffery closed his letter to plaintiff by saying, "You will note from the above that at the present time Briggs & Turivas have charged this shipment back to us and we will do all we can for you, but under the circumstances we must look to you for full protection on this transaction."

There is also in the record a letter from defendant to the Keystone Company dated March 15, in which defendant says, "We are having a controversy with our shippers concerning shipment of car E. & O. 136874, invoiced to you to contain heavy turnings. We understand that shippers are going to take up direct with you on account of not having any order with us when this car was forwarded. Our original invoice, covering the material in this car, showed E. & O. 10306. We are going to ask, at this time, that you please do not give any information pertaining to the character of the scrap this car contained, or arrange to accept billing from anyone but ourselves covering same. If you will handle as we suggest, we believe that same can be straightened out from this end and you will in no way become involved in this transaction."

On these facts it is the contention of the plaintiff that the carload of steel turnings, the contents of car E. & O. 136874, was the plaintiff's property; that the plaintiff never sold that car to Jeffery nor invested him with the indicia of ownership, the bill of lading being taken out by the plaintiff showing a consignment to the Keystone Company and retained by the plaintiff; that it has never been paid for the contents of this car but that defendant got the money for the car from the Keystone Company; that this money was received by the defendant in payment of property belonging to the plaintiff and therefore







the plaintiff is entitled to recover it from the defendant in an action for money had and received.

On the other hand, it is the defendant's position, on the merits of the case, that car B. & O. 136874, was a replacement under the plaintiff's contract with Jeffery and the contract of the latter with the defendant; that plaintiff may look only to Jeffery for payment on this shipment; that the money it received from the Keystone Company was in payment of the material delivered in the regular way from plaintiff to Jeffery, from Jeffery to defendant; and by the latter to the Keystone Company under their respective contracts and that, therefore, the plaintiff has no claim against the defendant for the money received by it on account of this car.

One Cohen, president of the plaintiff company, testified both on the plaintiff's direct case and on its case in rebuttal. In testifying on the direct case he said that the car in question was not sold to anybody; that the bill of lading on the car was not transferred to anybody; that after the car was loaded, it was shipped to the Keystone Company. On cross-examination he testified that when the car was so shipped, the plaintiff had no order, with the Keystone Company; that the plaintiff shipped the car to the Keystone Company because it was instructed to do so by one Bobbie, an employee of Jeffery; that Bobbie told plaintiff "to ship a car for them (Jeffery) to Keystone" and this car was shipped; that at this time plaintiff had a contract with Jeffery for the sale of two cars of steel turnings, but this car was not shipped under that contract; that plaintiff billed Jeffery for two cars under that contract, one of which was 10306.

Jeffery, called as a witness for the defendant, testified



about requesting plaintiff to divert two cars of steel turnings to the Keystone Company; that cars Santa Fe 79557 and W. & O. 10306 were the cars that were shipped; that the latter was never received; that car 136874 was not one of the cars ordered to the Keystone Company; that he talked with Cohen, plaintiff's president, about the shipment of that car on several occasions; that these conversations related to the acceptance of this car by the defendant from the witness; that at a conversation between the witness and Cohen the latter part of February or the first part of March, 1919, it was stated that the defendant was objecting to receiving car 136874, in lieu of car 10306 and Cohen said that defendant "should accept the car \* \* \* and he would hold us (Jeffery) blameless under our contract." Jeffery further testified that Cohen told him that car 136874 had been shipped "in order to make delivery on my (Jeffery's) contract." Later the witness again testified that car W. & O. 10306 was never received; that a car was shipped by the plaintiff to replace that car and that the number of the car so shipped was 136874, (the car in question); that the office of the witness had correspondence with the plaintiff about that car. This was the correspondence of February 13, 1919, above referred to, the letter from the witness "per C. H. Bobbie", to the plaintiff confirming conversation with Cohen to the effect that shipment involved in car W. & O. 10306 had been transferred into car W. & O. 136874. Jeffery then testified that he had a conversation with Cohen after that letter was sent, about March 1, to the effect that car 136874 was to replace car 10306 on the Jeffery order, so that delivery could be made. The court struck out the testimony as to this conversation, apparently because it had taken place after the delivery was made. That fact furnished no reason for keeping out the conversation and the court erred in so doing. Jeffery testified further that he applied car 10306 on his contract with plaintiff for two cars steel turnings, above







referred to, which was the only contract he had with plaintiff at that time.

One Parker, defendant's general manager, testified that he had a conversation with Mr. Cohen, president of the plaintiff company, about June, 1920, with reference to this car; that Cohen then said he had shipped that car to the Keystone Company for the account of Jeffery, who had sold the car to defendant; that this conversation took place at defendant's place of business, where Cohen had called to see about this car; that Jeffery was with Cohen at the time.

The witness Cohen was again called to testify in rebuttal. He denied telling Jeffery he was shipping car 136874 under his contract or that he told Parker, in June, that he had shipped this car to replace car 10306. On cross-examination he testified that Dobbie, representing Jeffery, called him up in the latter part of January, 1919, and told him that car 10306 had not been delivered to the Keystone Company, and wanted to know what had become of it and he said he would look it up and let him know; that he could get no trace of the car, so he had an empty car placed; that the next day or day after, he told Dobbie he could get no trace of the lost car and that he would load another car for him (Jeffery); that he then loaded the car in question, 136874, and shipped that to the Keystone Company; that Dobbie did not ask him to ship it, but he told Dobbie he would do so and Dobbie said, if there would be no obligation to them it would be all right. He further testified that when he loaded this other car, 136874, he knew where it was going; that Dobbie did not tell him, but he just shipped it to the Keystone Company; that the plaintiff had no contract with that Company. The court then asked the witness

relating to, which was the only document he had at his disposal  
at that time.

The letter, dated 1941, was received by the  
that he had a conversation with Mr. Smith, President of the  
National Company, about 1941, and that he had a conversation with  
him; that letter was sent to him by the National Company, and  
after looking for the document in 1941, he had said the  
one to defendant; that this conversation took place at the  
one's place of business, where a letter was written in the  
this one; that letter was given to him at the time.

The witness then was asked to testify in the  
detail. He stated that letter is now in his possession and  
under the witness is that in 1941, he was, and he  
had signed that one in 1941 and 1942. In 1941-1942  
then he testified that National Company letter, which was  
up in the letter head of National, 1941, was sent to him and  
1942 was sent to him in the National Company, and was  
ed in 1941 and 1942 and it was said he would look it  
up and let him know; that he would let him know of the one, and  
he had no copy now; that the one was up to the other,  
he told him he would let him know of the one and that  
he would look around for the (letter); that he then  
located the one in question, 1941, and signed that in the  
National Company; that letter was sent to him in 1941, and  
he told him he would let him know of the one and that  
he was disappointed to hear it was not the one, he stated  
certified that he stated that letter was, 1941, he then  
stated it was not the one; that letter was sent to him, but he had  
signed it in the National Company; that the plaintiff had no  
contact with the National Company.

how he came to send this car to the Keystone Company and he answered, "Well, for this other car \* \* \* N. & O. 10306 \* \* \* he (Jeffery) wanted to make a shipment of another car in its place \* \* \* but \* \* \* he was not to be obligated in any manner or form in regard to any expense at all which occurred on that shipment." The witness then testified that he expected to be paid for the material shipped in this car by whoever unloaded it; that he did not expect Jeffery to pay for the car "while he wasn't obligated." The witness was then asked whether he was just shipping a car at random without a price being fixed, and he answered that there was a price which was \$23.75. He was asked where he got that price from and he answered, "that was Jeffery's contract price." On re-direct examination he testified that the car was to be unloaded at a price of \$34.00, or not at all and that Jeffery was the one who was to determine whether or not it was to be unloaded; that Jeffery was to get his commission if the car was unloaded and if it was not he was not to be obligated in any way. On re-cross examination the witness testified that he retained the bill of lading and shipped the car to the Keystone Company; that the car could go directly into their plant.- "we took our own chances"; that he knew Jeffery had a contract with the defendant.

The defendant urges a number of points in support of its appeal but in our view of the case it will be necessary to consider but one of them. In our opinion the verdict of the jury, finding the issues for the plaintiff and the judgment accordingly, are against the manifest weight of the evidence.

When Bobbie talked with Cohen in the latter part of January, complaining about the non-delivery of one of the two cars Jeffery had purchased from the plaintiff, under his contract of November 6, which cars had been ordered delivered to the



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Keystone Company, and Cohen sent forward another car, to the Keystone Company, naturally Debbie wanted to make sure the plaintiff would not look to Jeffery for payment on the additional car as well as the car which had gone astray, and hence the conversation testified to by Cohen, himself. Later, apparently, the lost car was located and it was found who had received it, and then plaintiff returned to Jeffery the amount the latter had paid on that car. Why plaintiff did not then bill Jeffery for the car in question is not explained. But the fact that it did not, cannot give it a right of action against the defendant. Plaintiff had no contract with the Keystone Company nor with the defendant. It seems perfectly clear that the only possible reason why plaintiff shipped the car in question to the Keystone Company, was the fact that, under the contract plaintiff had with Jeffery, and the contract Jeffery had with the defendant, and the contract defendant had with the Keystone Company, two cars had been shipped direct to the Keystone Company, by the plaintiff on defendant's directions to Jeffery and Jeffery's directions to plaintiff, and one of these cars was lost, and, as Cohen, himself, testified, in answer to questions by the court, he shipped the car in question to the Keystone Company because Debbie or Jeffery wanted to ship another car in place of the car which had been lost and which at that time had not been located. That this car was so shipped by plaintiff, under its contract with Jeffery, is further shown by the fact that Cohen says there was a price of \$23.75 on it, and that he fixes the price at that figure because "that was Jeffery's price."

The fact that the plaintiff retained the bill of lading does not affect the questions involved here. The bill of lading was introduced in evidence and shows that the car in question was



consigned direct to the Keystone Company. Neither does it matter that the car in question was shipped long after the 45 day period fixed for delivery in the contract between plaintiff and Jeffery and also in the contract between the latter and the defendant. The parties might waive that provision if they chose. It would seem probable that it was with that provision of its contract in mind that plaintiff represented that the material which had been shipped originally in car M. & O. 10306, had been transferred to the new car. That such a representation was made seems clear. Not only is there direct testimony to that effect but we have Jeffery's letter to the plaintiff, dated February 13, 1919, confirming plaintiff's advice that such was the case, and no reply from the plaintiff, questioning such confirmation.

Apparently the contents of these two cars, 10306 and 136274, were not the same in fact but this also cannot affect the questions involved here. There were 36,000 lbs. more in the car which reached the Keystone Company, than were in the one sent originally, which did not arrive. The contracts in question did not call for any fixed weight, but for two carloads to be paid for at a stated price per ton.

Evidently the writer of the letter of March 1, from defendant to Jeffery, as quoted by the latter in his letter to the plaintiff, dated March 5, was not familiar with what had previously transpired, for at that time there had already been a replacement of the lost car, and the car shipped to replace the lost car had been delivered and unloaded by the Keystone Company.

Doubtless, the defendant may be required to account to someone, by reason of the delivery of this car in question, to the Keystone Company and payment therefor by that Company to







it, but it is not liable to the plaintiff. Doubtless, also, the plaintiff may require someone to account to it for this car, but it may not claim that in accepting payment from the Haystone Company, the defendant received money belonging to the plaintiff, for which it is liable in an action for money had and received.

Neither do we consider it material that Jeffery testified that he made no claim to this money. That proposition had nothing to do with this case. It was wholly irrelevant and immaterial and defendant's objections to that testimony should have been sustained. Plaintiff's argument that Jeffery would be estopped by that testimony, from requiring defendant to account to him, on this car, is not tenable and the case cited, Romual Brothers v. Wenka, 196 Ill. App. 569, contains nothing to that effect. The facts involved in that case are quite different from the facts involved here.

With such matters as may be involved between plaintiff and Jeffery on the one hand and the defendant, and Jeffery, on the other, by reason of their respective contracts, and the facts involving the shipment of this car, E. & O. 136874, we have nothing to do, in the case at bar. We merely held that on the evidence in this record, it is clear that the money paid the defendant by the Haystone Company, was not the plaintiff's money and the plaintiff may not recover it from the defendant, in an action for money had and received. It will be unnecessary to discuss or refer to the procedural errors alleged or the other points contended for by the respective parties.

For the reasons stated, the judgment of the Circuit Court is reversed with a finding of fact.



REVERSED WITH A FINDING OF FACT.

TAYLOR AND O'CONNOR, JJ. CONCUR.

FINDING OF FACT:-

We find as a fact that the plaintiff shipped the car of steel turnings involved, to the Keystone Company, under its contract with Jeffery, to replace a car originally shipped under that contract, which had not been delivered; that the contents were properly received by the Keystone Company, and by it paid for under its contract with defendant; and that the money so paid to defendant by the Keystone Company was not the plaintiff's money but was money due the defendant from the Keystone Company under the contract between these parties.





Opinion filed April 11, 1923.

CHARLES GULLO,

Appellee.

v.

AMERICAN INSURANCE COMPANY,  
of NEWARK, NEW JERSEY, a  
corporation.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

229 I.A. 643<sup>5</sup>

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Insurance Company seeks to reverse a judgment for \$976.32, recovered against it in the Municipal Court of Chicago by the plaintiff.

The plaintiff, Gullo, owned a motor truck, on which the Hamilton Investment Company held a chattel mortgage, in the sum of \$1414.03. The plaintiff testified that he paid \$2700.00 or \$2800.00 for the truck. The defendant issued a policy of insurance on the truck, against loss or damage by fire, in a sum not exceeding \$2500.00, the beneficiaries being the mortgagee and the plaintiff, as their interests might appear. On December 17, 1917, the truck was in a fire, and it is claimed that it was damaged to an extent in excess of the amount for which it was insured. The Insurance Company settled with the mortgagee and paid it the amount of the mortgage indebtedness. The owner of the equity in the truck, Gullo, brought this suit to recover the value of his interest in it at the time of the fire.

Only one point is urged by the defendant in support of its appeal. The policy of insurance provided that no action at law or suit in equity could be maintained unless com-

Special Agent in Charge

100 - 1000

RECEIVED  
JAN 11 1933  
FEDERAL BUREAU OF INVESTIGATION  
U. S. DEPARTMENT OF JUSTICE  
WASHINGTON, D. C.

33011043

TO DIRECTOR, FBI (100-1000)  
FROM SAC, NEW YORK (100-1000)

Re New York letter to Bureau dated 1/10/33, captioned as above.  
Enclosed for the Bureau are two copies of a letterhead memorandum  
dated and captioned as above.

The following is a summary of the information received from  
the New York office on 1/10/33, captioned as above, in  
connection with the investigation of the activities of the  
New York office of the American People's Party, Inc. (APPI),  
which was organized in 1932 for the purpose of promoting  
the interests of the people of the United States. The APPI  
is a non-profit organization which has been organized for  
the purpose of promoting the interests of the people of the  
United States. It is a non-profit organization which has  
been organized for the purpose of promoting the interests of  
the people of the United States. It is a non-profit organization  
which has been organized for the purpose of promoting the  
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promoting the interests of the people of the United States.

Very truly yours,  
Special Agent in Charge

menced within twelve months next after the happening of the loss. The plaintiff did not institute his suit against the defendant until shortly after the expiration of a year after the fire. It is the contention of the defendant that the plaintiff's action is barred by the limitation clause in the policy, while the plaintiff contends that the defendant's conduct was such as to constitute a waiver of that provision, and that, therefore, it cannot be availed of by the defendant to defeat his action. There is considerable dispute in the testimony as to what occurred after the fire. The plaintiff testified that he first saw the defendant's representative, one North, a few days after the fire; that North then told him that the Fire Marshal was investigating the fire, and that he, North, would communicate with the plaintiff in a week or two; that after a week or two, North called the plaintiff up and the latter went to the Fire Marshal's office; that about two weeks later he again saw North and asked him where the truck was, and he said it was in a shop for repairs, naming the shop in question; that the witness asked North if he could give him the truck, and North asked him if he wanted the truck or the money, and the witness told him he wanted the truck. When the truck was burned it was in a barn or shed in the rear of the plaintiff's premises. Plaintiff testified that it remained there some days after the fire, and he did not know who took it away. Plaintiff also testified that he visited the defendant's place of business about 25 times or more and that he talked with North about 15 times; that the third or fourth time he saw him North said he would "make it satisfactory". The plaintiff testified "I asked him all the time for the truck, and he would say 'All right.' The last time, about ten or eleven months after, he just chased me away from the steps. He never told me why the truck was not repaired. He told me the truck was over there, that it would be

[illegible]



repaired or he would give me the money. He said because of lots of work in war time it would take lots of time. \* \* \* He said the same things all the time. He said the truck 'is over there'. I am going to repair it for you, otherwise you get your money. \* \* \* I told him I had money to pay for the truck. \* \* \* to pay off the chattel mortgage. I told him if he wanted me to pay it all, I would give him the rest of the money. \* \* \* I talked another time to him, and I told him that I wanted money or I would go to a lawyer. He said not to go to a lawyer, that he would fix me up, the money or the truck. That was eight or nine months after the fire. \* \* \* The last time I saw Mr. North was in his office, and he said, 'I don't want to give you any money.' That was about ten months after the fire. \* \* \* They never paid me any money and they never gave me the truck."

North testified for the defendant and gave a somewhat different version of the negotiations between him and the plaintiff over this insurance. According to his testimony he never saw the plaintiff after July 1, following the fire.

It is not contended that the verdict and judgment are against the manifest weight of the evidence.

Where an insurance company, after a loss has occurred, holds out hope of payment, and thereby induces the assured not to sue within the period limited in the policy, it will be considered that the insurance company has waived the condition in the policy, providing that suit shall not be maintained against it unless brought within the time limit. Illinois Live Stock Ins. Co. v. Baker, 153 Ill. 240; Williams v. Bankers Union of Chicago, 166 Ill. App. 495; Chicago and W.I.R.R. Co. v. Guaranty Co. of North America, 207 Ill. App. 483; Galloway v. Standard Fire Ins. Co., 45 W.V. 237; Lynchburg Cotton Mill Co. v. Travelers Ins. Co. 149 Fed.



954.

But, the defendant contends that inasmuch as it appears from the plaintiff's own testimony, that the defendant refused to pay him anything, on his claim, prior to the expiration of the period of one year, and he was thus given an opportunity to institute any proceedings he cared to, within the year, he should have done so, and he may not contend now that the conduct of the defendant amounted to a waiver. In the case of Illinois Live Stock Ins. Co. v. Baker, supra, it was held that where the policy provided that any suit brought on it, must be brought within a certain limited period, and where the insurer induced the policy holder to forego bringing any action, by hope of payment or otherwise, it would be considered that the insurer had waived the limitation clause in the policy, and that when once waived it cannot be revived, after any substantial part of the limitation period had been lost, by the insurer telling the policy holder that nothing would be paid under the claim, or that, (as in the case cited) the company had become insolvent and nothing could be gained by a suit. In that case the court held that if there was once a waiver it could not be recalled or revoked, the court saying: "If any substantial part of the time provided by the limitation is lost by reason of the waiver, the limitation is wholly gone. It cannot be revived, nor can the plaintiff be required to sue within any time short of the statutory limitations." In that case it was urged, as it is urged here, that before the period of limitation expired, the policy holder knew that the company would pay nothing on the loss, and further, if the time remaining within the period of limitations could be considered a reasonable time for bringing suit, the policy holder was bound by the conditions in the policy and could not recover unless he did bring suit within the period. The court held the contrary.



The first thing that I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket of the car. I looked around and saw a few other people walking towards the building. The air was thick with the smell of exhaust from the cars. I felt a little nervous, but I knew I had to do this. I walked towards the building and saw a sign that said "Entrance". I pushed the door open and stepped inside. The room was dimly lit and the air was stale. I looked around and saw a few other people sitting at tables. I walked towards the bar and saw a man behind the counter. I ordered a drink and waited. The man behind the bar looked at me and said, "What's your name?" I told him my name and he said, "Welcome to the club." I took a sip of my drink and looked around. The room was filled with people and the music was loud. I felt like I had entered a new world.



For the reasons stated, the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

THE UNIVERSITY OF CHICAGO

CHICAGO, ILL.

1900

THE UNIVERSITY OF CHICAGO

124 - 27593.

Opinion filed April 11, 1923.

WILLIAM G. HOWSON,

Appellee,

v.

MRS. EVA DOWLING,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

229 I.A. 644

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was a proceeding in forcible entry and detainer. The plaintiff, as landlord, and the defendant, as tenant, executed a lease for an apartment, under date of February 4, 1919, by the terms of which the plaintiff leased the defendant the apartment for a period of two years beginning October 1, 1919, and ending September 30, 1921, "and from year to year thereafter unless and until this lease shall be terminated, at the date last above mentioned or at a like date in any subsequent year thereafter, by the giving by either party to the other of not less than sixty (60) days notice in writing, of such termination, which said notice shall be delivered in person or by registered mail. \* \* \* when to the lessee, at the address of the demise premises." The defendant went into possession under this lease. The plaintiff identified a notice, which he testified he had sent to the defendant by registered mail. He introduced in evidence the receipt given him at the time he delivered the notice to the postal authorities for registration, and mailing, and also the return receipt acknowledging receipt of the letter, under date of July 21, 1921, which return receipt bore the signature of Mrs. Dowling, the defendant. This notice

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Journal of Management Inquiry 22(1) 3-15

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10-1-75 BUREAU OF THE ARMY, JUNE, 1961, IN VIEW OF THE FACT THAT THE

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which the plaintiff sent the defendant by registered mail was dated July 20, 1921, was addressed to Mrs. Bowling and read as follows: "This is to notify you that your lease on premises No. 6211 South Park Avenue, third apartment, dated February 4, 1919, expires on September 30, 1921, and your said lease is hereby terminated, to take effect on that date." This notice was signed by the plaintiff.

The defendant refused to vacate the premises on September 30, 1921, but tendered her monthly rental for October, which the plaintiff refused to accept. On October 1, these proceedings were instituted.

No evidence was introduced by the defendant, but a motion was made to find the issues for her, at the close of the plaintiff's case. The only contention made in support of the appeal is that the court erred in denying the defendant's motion. This contention is based on a paragraph in the lease reading as follows:

"Sixteenth. The service of any five days' notice, or other notice to quit, or demand for possession, or notice that the tenancy hereby created will be terminated on a date therein named, shall not of itself be deemed a termination hereof, nor shall the institution of any action of forcible entry or detainer be deemed a termination hereof, nor shall any judgment for possession that may be rendered in such action be deemed a termination hereof, whether such judgment shall have been rendered for non-payment of rent or for breach of any of the covenants in this lease contained, nor shall the entry of such judgment, release the lessee from the obligation to pay the rent hereby reserved to be paid during the balance of the term hereof, or during any extension hereof, but the lessor may receive and collect any rent due from the lessee, and the payment of said rent shall not waive or affect any such notice, suit or judgment, or in any manner whatsoever waive, affect, change, modify or alter any rights or remedies which the lessor may have by virtue hereof."

It is contended that the provisions of the fore-



going paragraph are inconsistent with the provisions of the lease, as first quoted above; that this ambiguity in the lease is to be construed against the landlord, and that under such a construction, the notice sent the defendant by registered mail was insufficient to effect a termination of the tenancy. This contention is wholly untenable. Quite apparently the sixteenth paragraph was inserted in the lease for the purpose of enabling the landlord to collect the amount stipulated in the lease as rent, for the full period of time the premises might be occupied by the defendant, notwithstanding the doing of any of the things set forth in that paragraph. The paragraph in question had nothing to do with the right of the landlord to terminate the lease by a sixty days' notice in writing, sent to the tenant by registered mail.

The judgment of the trial court, awarding the plaintiff possession is, therefore, affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

This paragraph was inserted into the minutes of the  
 Board, as they were above; and this finding is the  
 basis of the decision reached by the Board, and that under  
 such a construction, the entire case is decided by the  
 Board and not referred to either a committee or the  
 Board. This construction is clearly indicated. While there-  
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136 - 27611

Opinion Filed April 11, 1923.

GEORGE E. MORRIS,

Appellee.

APPEAL FROM

v.

MUNICIPAL COURT

OF CHICAGO.

PAUL ZAKES and JAMES CHIMBURIS,

Appellants.

229 I.A. 644<sup>2</sup>

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was a forcible entry and detainer proceeding. The plaintiff sued for the possession of a garage and a barn in the rear of 1326 West Monroe Street, in the City of Chicago.

It appears from the record that the plaintiff, Morris, made a written lease of the premises in question, to the defendant Zakes. This lease contained a special covenant and agreement to the effect that the entrance to the barn would always remain unlocked so that the occupants of the premises in front of the barn could pass back and forth through the barn with their garbage. The lease contained the usual covenant against sub-letting without the consent of the lessor, in writing. The other defendant, Chimburis, was permitted, by Zakes, to occupy part of the barn, and the plaintiff claims this was without his consent. The contentions of the plaintiff in support of his case, were to the effect that Zakes had sub-let part of the premises without the plaintiff's consent, that Chimburis was using the premises in a manner calculated to injure their reputation, and that the tenant, Zakes, failed to keep the entrance to the barn unlocked as stipulated in the lease.

1911 - 1912

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The evidence on all three of these issues was conflicting. These proceedings were instituted about the middle of December 1921. The plaintiff testified that the defendant, Chimburis, occupied rooms on the second floor of the barn without his consent; that four or five weeks prior to the beginning of this suit he saw a woman go into the barn one night with Chimburis, and later come out with him; that about the middle of November he complained to Lakes about the violations of the terms of the lease, and told him that if they continued he would put him out; that he complained to Lakes about his non-compliance with the terms of the lease, by which the tenants in the front part of the property were to have access to the barn, so as to pass to and fro with their garbage; that the only way to reach the alley was through the barn; that on a number of occasions he found the entrance to the barn barricaded and the garbage piled in the yard; that the defendant, Lakes, had sub-let space for the cars of others, in the barn, without his consent. On cross-examination the plaintiff admitted he had received a check from the defendant, Lakes, for the December rent, but he stated that he mailed the money back, in the form of a money order. He further admitted that along in June, 1921, he was up-stairs in the barn, and saw Chimburis there at that time.

Several women who lived in the front part of the premises, and who had had occasion to pass back and forth through the barn to the alley with their garbage, testified to numerous occasions when the barn door was either locked or barricaded or when automobiles were standing in front of it so that passage through the barn was impossible. Some of them also testified to the fact that the defendant, Chimburis, had made suggestive and insulting remarks to them as they passed through the barn. One woman cer-





reiterated the plaintiff as to the incident to which he testified concerning a woman going into the barn one night with the defendant, Chimburis, and coming out with him a half an hour or so later.

Chimburis testified that he had lived on the second floor of the barn for twenty years. He testified that when Zakos received the lease involved here, from the plaintiff, Zakos told him that he did not have to move out, he could stay there without paying anything and could watch his machine. He denied the remarks testified to by the various women tenants, referred to above. Zakos testified that he had had a lease on this barn for twenty two years; that it was always kept open as the lease required. It would seem from some of the questions asked by the court, that the plaintiff acquired his interest in the property in question sometime in June, 1921. The lease from him to Zakos was dated June 16, 1921. On cross-examination, Zakos admitted that the plaintiff had complained to him about the alleged misconduct of Chimburis, but he claimed there was no complaint of this kind on the part of the plaintiff until he and the plaintiff had had some trouble about the plaintiff keeping a car of his own in the garage.

Zakos further testified that he had never had any complaints, in the twenty-two years he had had this barn, until the plaintiff had taken possession of the property in the summer of 1921.

In support of their appeal, the defendants contend that the record shows that the plaintiff was not entitled to possession of the premises involved, at the time he instituted these proceedings, inasmuch as he had, at that time, accepted the rent

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1. The first step in the process of identifying a potential threat to national security is to determine whether the information in question is classified. If it is not classified, then it is not a threat to national security. If it is classified, then it is a threat to national security.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a propaganda organization.

for the current month. In our opinion there is nothing in this contention for the record shows that the plaintiff had returned the rent.

The chief question involved has to do with the alleged breach of the condition in the lease, under which the door of the barn was to be kept unlocked, and the tenants in the front part of the property given access to the alley by means of a passage way through the barn. On this issue the evidence is conflicting. The defendants contend in their brief that it was evenly balanced. In our opinion the evidence is such as to support the action of the trial court in finding for the plaintiff. At least, we are not in a position to say that the finding of the court is against the manifest weight of the evidence.

The defendants also contend that the notice served by the plaintiff was insufficient. We are unable to find that any question was raised in the trial court about the notice, and it, therefore, cannot be raised here.

We find no error in the record and, therefore, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

for the amount shown. It was explained that the amount shown in the account was the amount shown in the account and the amount shown in the account.

The other question involved was the fact that the amount shown in the account was the amount shown in the account and the amount shown in the account. The amount shown in the account was the amount shown in the account and the amount shown in the account. The amount shown in the account was the amount shown in the account and the amount shown in the account.

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THE AMOUNT SHOWN IN THE ACCOUNT

THE AMOUNT SHOWN IN THE ACCOUNT



IRVING G. ZALOVE,

Appellee,

v.

YELLOW CAB COMPANY,  
a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE THOMSON delivered the opinion  
of the court.

By this appeal the defendant corporation seeks to reverse a judgment of the Municipal Court of Chicago, in the sum of \$125.00, which was there recovered against it by the plaintiff.

It appears from the record that one Wilson had been injured by one of the cabs of the defendant company. The plaintiff entered into a contract with Wilson, wherein it was provided that he was to act as Wilson's lawyer in prosecuting his claim for damages against the defendant, and as compensation was to receive one-half of such amount as might be recovered by the plaintiff, either by suit or otherwise. Following the consummation of this contract, there was some negotiation back and forth and ultimately the defendant settled with Wilson, by paying him \$250.00, without the knowledge of the plaintiff. The latter then instituted the proceedings at bar, to enforce the attorney's lien he claimed against the defendant, pursuant to the notice of lien which he had duly served upon it.

Only one contention is made by the defendant in support



of its appeal, which is that a contract between an attorney and his client, which was obtained by solicitation, cannot be the basis of an attorney's lien. Defendant refers to the case of The People v. Beresniak, 292 Ill. 305, and cases there cited. After a careful examination of the record, we are of the opinion that it is not such as to permit a consideration of this contention made by the defendant.

It is the plaintiff's testimony that the contract he made with Wilson was not solicited by him, but that he went to see Wilson in response to a telephone call. Wilson appeared as a witness for the defendant and his testimony was to the contrary. The issues in this case were presented to the court without a jury, and in deciding the case, the trial court distinctly intimated that he believed the testimony of the plaintiff rather than that of the defendant, therefore, the court found the issues for the plaintiff, believing that he had not solicited Wilson's case. We have carefully read the testimony, as found in the record. That of the plaintiff is certainly clearer than the testimony of Wilson, as the trial court said in connection with his finding. Wilson testified as to being solicited by someone in the receiving room of the hospital, to which he went after his injury, and he stated that this same person who solicited him in the receiving room appeared later at his bedside, on the same day, which was Sunday. He further testified that he could not identify the plaintiff as the man who solicited him in the receiving room of the hospital, and later visited him. It appears, without contradiction, however, that the plaintiff did go to the hospital and confer with Wilson, and there concluded his arrangement which ended in Wilson signing a power of attorney





which was the basis of the contract between them. But it appears that this transaction took place a day or two after the day Wilson was injured.

We are unable to say, from the record, that the finding of the trial court was against the manifest weight of the evidence. The judgment of the Municipal Court is, therefore, affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

which was the result of the medical profession, but it is not  
 that the government has done a thing to the right of the day  
 which was wrong.

We are sorry to say, that the country, that has been  
 at the helm, never has been the constant subject of the subject.  
 The position of the country is, however, different.

# THE

THE

Opinion filed April 12, 1923.

CHESTER GROBAREK, a minor,  
by Michael Grobarek, his  
next friend,

Appellee.

v.

QUALITY WET WASH LAUNDRY,  
a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

*Art. 1  
dismissed*

2291A-614<sup>4</sup>

MR. PRESIDING JUSTICE THOMSON delivered the opinion  
of the court.

By this action the plaintiff sought to recover damages  
for injuries alleged to have been received when he was struck by  
a motor vehicle or automobile truck, driven by one Goodman, in  
the service of the defendant corporation. The action was begun  
against both the corporation and Goodman. The summons was re-  
turned as served on the corporation but indicated that Goodman  
had not been found. A default was duly entered as to the corpora-  
tion for want of appearance, and several months later the suit  
was dismissed as to Goodman. On plaintiff's motion a jury was  
called and damages were assessed against the corporation in the  
sum of \$3500.00 and judgment was entered against the corporation  
for that amount.

Within the judgment term the corporation entered its  
appearance and moved to set aside the verdict and judgment. In  
support of that motion, certain affidavits were filed, to which  
the plaintiff filed counter affidavits. On a consideration of  
these affidavits the court continued the hearing so that certain  
of the affiants could be brought in to testify in open court.  
The court later heard this testimony and after a consideration



THE UNIVERSITY OF CHICAGO, CHICAGO, ILL.

of the year.

It is not the intention of the University of Chicago to publish any book which is not of a high standard of scholarship. The University of Chicago is a body of scholars, and it is the duty of the University to publish only the best work. The University of Chicago is a body of scholars, and it is the duty of the University to publish only the best work. The University of Chicago is a body of scholars, and it is the duty of the University to publish only the best work.

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of the affidavits and the testimony, the defendant's motion to vacate and set aside the judgment was denied. To reverse that judgment the defendant has perfected this appeal.

It is the well established rule in this State that motions to vacate and set aside judgments entered by default are addressed to the sound discretion of the court, and orders of the court denying such motions will not be reversed unless it is shown that the trial court abused that discretion. Mitsche v. City of Chicago, 280 Ill. 268.

The defendant seeking to have a judgment by default set aside, must show both that he has a meritorious defense to the action and that the entry of the default and judgment against him was not occasioned by any lack of diligence on his part, but that he exercised due diligence as to his rights in the premises. Mitsche v. City of Chicago, supra; Mariford Life Ins. Co. v. Bossiter, 196 Ill. 277. In connection with the motion of the defendant to set aside the default and judgment in the case at bar, affidavits were submitted to the effect that the defendant had a meritorious defense to the plaintiff's action and also that he had exercised due diligence. The only controversy involved on this appeal has to do with the latter question, and the question of the defendant's diligence depends on the further question of whether the defendant was properly served with summons as indicated by the return of the sheriff. If the service was proper, the trial court did not err in overruling the motion to vacate.

Under our statutes, (Ch.110, Sec. 3, J.& A. par. 8545) it is provided that a corporation may be served with process "by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought. If he shall not be

of the plaintiff and the defendant, the plaintiff's action is  
voidable and not void and judgment was denied. It follows that  
judgment of the defendant was reversed and remanded.

It is the well established rule in this State that  
whereas in cases not voidable judgments entered by default are  
affirmed in the final disposition of the cause, and none of the  
court having such actions will not be reversed unless it is  
shown that the trial court abused its discretion. Wright v.

City of Chicago, 180 Ill. 222.

The defendant seeks to have a judgment of default  
set aside, and now seeks to have a judgment entered in  
the action and that the entry of the default and judgment against  
him not be reversed by the lack of diligence on his part, but  
that he maintained diligence in the action in the present.

Wright v. City of Chicago, 180 Ill. 222.

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found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any agent of said company, found in the county." The summons here involved was returned by the sheriff with the following notation: "Served this writ on the within named, Quality Wet Wash Laundry, a corporation, by delivering a copy thereof to R. M. Shipman, manager and agent of said corporation, this first day of March, 1921. The president of said corporation not found in my county. The other within named defendant not found in my county. Charles W. Peters, Sheriff, by Edward J. Anderson, Deputy."

In support of the motion to vacate the defendant submitted the affidavit of one John W. Gibbons, to the effect that said affiant was the president of the defendant corporation, at the time of the service of this summons; that John W. Gibbons was vice president and Julia W. Gibbons, secretary and treasurer of the corporation; that the affiant was the active manager of the corporation, had an office on the premises occupied by the corporation, and devoted his entire time to its business, and could be found at his said office at all times during February and March, 1921; that J. W. Gibbons, vice president, occupied an office on the premises of the corporation, and could be found there at all times during February and March, 1921; that Julia W. Gibbons, secretary and treasurer occupied a desk upon the premises of the corporation; that affiant at no time attempted to evade service of the summons and that service was not had upon him, and that no notice of the pendency of the suit was given him or the corporation; that the first knowledge he had of the judgment against the corporation and in favor of the plaintiff came to him on October 31, 1921, when he was notified by a message from the Chicago Laundry Owners' Associa-







tion, of which the defendant was a member. The defendant also submitted the affidavit of A. E. Shipman, to the effect that at the time of the alleged service of summons on the defendant, he was employed by it as foreman of the wash room; that in the month of March, 1921, in the presence of one Verbillion, one of the defendant's employees, some person entered the premises of the defendant and stated that he was an officer and asked for Goodman, and affiant told him that Goodman was not there and the officer stated that he had a summons for Goodman and that someone would have to sign for it, whereupon, the affiant, at the request of the officer and in the presence of Verbillion, signed some paper, the contents of which he did not know; that the officer left no summons with him, or any other paper of any kind, and that he never said anything of this occurrence to any of the officers of the corporation until October 31, 1921, when the president interrogated him; that he said nothing to the officers of the corporation because he thought the summons was a matter which involved Goodman only. Shipman's affidavit was further to the effect that he was not an officer of the corporation, owned no stock, and that his duties were confined solely to the wash room and that he did not "perform any act of agency for the corporation", nor purchase supplies nor make checks or notes on its behalf.

The affidavit of Verbillion was also submitted to the effect that he was working in the wash room in March, 1921, when the officer entered, saying he had a summons; that he asked for Mr. Goodman, and Shipman said he was not there; that the officer then said it would be necessary for someone to sign for the summons, whereupon Shipman signed a paper, which the officer then put in his pocket; that the officer did not leave any summons or other paper of any kind with Shipman. The affidavit of John W. Gibbons



was also submitted, to the effect that he was the vice-president of defendant corporation and that he had no knowledge of this suit prior to October 31, 1921; that he never received any service of summons or other written or oral notice of the suit. The affidavit of Julia B. Gibbons, to the same effect, was also submitted.

In opposition to the motion, the plaintiff submitted the affidavit of the deputy sheriff Anderson, to the effect that in the regular performance of his duties, he had occasion to make service of process on the defendant corporation, and that on March 1, 1921, he served said corporation with said summons, by reading and leaving a copy thereof, with H. S. Shipman, its manager and agent; that before such service, he made due inquiry for the president of the corporation, in order to make service upon him, but was told he was not on the premises; that when he served Shipman, the latter asked when the case was coming up for trial and affiant told him he would have to look at the records to find out; that he did not ask Shipman to sign his name to anything, and that Shipman did not sign any paper.

When called into open court to testify Shipman stated the facts just as he had set them forth in his affidavit. Verbillion testified that on the occasion of the alleged service, the officer stepped into the door and "wanted someone who was in charge of the laundry, he didn't care who it was, and, of course, Mr. Shipman came up then and things were handed over to him". He further said: "I stepped aside to let him in there to take care of the man." He further testified, as set forth in his affidavit that the officer said he was looking for Goodman; that he was looking for someone in charge of the laundry so he could find out "where Al Goodman's business was"; that he saw the officer hand a paper to Shipman and saw the latter sign it and return it to the officer.



1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed changes to the law of the United Kingdom relating to the treatment of the children of the United Kingdom who are born in the United Kingdom and who are the children of a United Kingdom citizen who is a member of the armed forces of the United Kingdom.

[illegible][illegible]



Anderson, the deputy, testified that the territory he covered was from the Lake Street to Halsted Street and from 37th Street to 50th Street in the City of Chicago; that when he went to the premises of the defendant to serve the summons in question, said premises being located at 488 West 28th Street, he entered and asked if the president of the concern was there and was told that he was not, whereupon, he asked for the next man in charge, and he was told that a man by the name of Shipman was the next man; that Shipman then came up and the witness asked him if he was the manager of the business and he said that he was; that the witness then told him that he had a summons to serve, "on the Quality Wet Wash, a corporation," that he then gave Shipman a copy of the summons, reading the original to him; that upon his request, Shipman gave him his initials, which the witness wrote on the original summons, putting that in his pocket and giving the copy to Shipman; that he did not have a summons for Goodman, and never mentioned his name, as that summons belonged to a deputy in a territory further south, where Goodman lived; that he did not ask Shipman to sign anything; that he did not go into the office; that he did not remember that anybody was in there.

After hearing this testimony the trial court announced that he believed the deputy had served the summons in the usual way leaving a copy with Shipman, and he stated that he believed the witness, and that Shipman and Verbillion were testifying falsely when they stated the contrary. The description of the visit of the deputy to the defendant's premises, as described by these two witnesses was not such as to inspire confidence in them. On the whole record the trial court was warranted in reaching the conclusion that on March 1, 1921, the deputy sheriff visited the premises of the defendant corporation; that upon making inquiry for,

"The first thing I noticed when I stepped out of the car was the cold, crisp air. It felt like a blanket, wrapping around me. I looked up at the sky, and the stars were so bright, so clear. It was like looking into a mirror, and I saw my reflection. I felt like I was part of something big, something important. I knew that this was my chance to make a difference, to change the world. I was going to do it, no matter what. I was going to be a hero."

"I was walking down the street, and I saw a man in a suit. He was looking at me, and I knew he was a detective. I felt like I was being followed, and I was scared. I started to run, but he caught me. He was holding a gun, and he was pointing it at me. I was shaking, and I was crying. He was talking to me, and I was listening. He was telling me that I was a good person, and that I was going to be a hero. I was so happy, and I was so proud. I was going to do it, no matter what. I was going to be a hero."

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the president he was told he was not in and that upon asking further inquiry for the man next in charge, he was referred to Shipman; that he then read the summons in question to Shipman and gave him a copy of it; and that Shipman was a foreman in the defendant's employ. On these facts, there was good service of summons on the corporation. Nothing further appearing to explain why no appearance was entered, resulting in the corporation being defaulted, there was no proper showing in support of the defendant's motion of due diligence on its part and it was therefore not error when the trial court overruled that motion. The order of the Circuit Court, appealed from, is therefore affirmed.

ORDER AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

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JOHN J. GERRITY, et al.

Appellees.

v.

MICHAEL F. GERRITY, et al.

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

229 I.A. 644<sup>5</sup>

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was a bill for the partition of certain real estate. The complainants, John and Peter Gerrity, and the defendants, Michael and James Gerrity, were the only heirs at law of one Elizabeth Gerrity, who, upon her death, was seized of the two pieces of real estate, the partition of which was sought by the bill filed by the complainants. After the issues had been duly joined, a reference was had to a Master, before whom the parties appeared and submitted their proof. In due time the Master submitted his first report, following which a decree of sale was entered. The sale was duly had and the Master made a report thereof, and the court entered its decree confirming the sale. On the first sale, the defendants bid in the property for the sum of \$3600.00, and they paid the Master \$180.00 cash on account of their bid. The decree confirming this sale ordered the purchasers to pay the balance of the purchase price within ten days of the delivery of the abstracts of title, and directed the Master to execute a proper conveyance, upon the payment of this balance, and further, to hold the proceeds pending the further order of the court as to distribution. This decree further referred the cause to the



Master again to take an account of rents collected and expenses incurred, and directed him to report the same with a proper order for distribution.

The Master heard certain evidence in connection with this reference for an accounting, and in due time submitted a supplemental report showing that the complainant, John J. Gerrity, had collected certain rents and that certain allowances should be made for expenses incurred and that certain other items should be deducted from the proceeds before distribution. In this report the Master further reported that \$1500.00 had been paid by the defendants on account of their purchase price of \$3600.00. The record shows that the defendants duly filed objections to this report, which were overruled. Later, on motion of complainants, the court ordered that the defendants' objections to the Master's supplemental report stand as exceptions thereto, and the court, on complainants' motion, further entered a rule on the defendants to pay the balance of the purchase price, to the Master, within 5 days. By this order the defendants' exceptions to the Master's report were ordered to be placed on the contested motion calendar of the court for further hearing. There is nothing in the record to indicate the final disposition made of these exceptions to the report of the Master, covering the matter of the accounting.

The record shows that at a later date the trial court entered an order, on motion of complainants, finding that the defendants had become the purchasers of the property in question at the Master's sale, at the price of \$3600.00; that thereafter they had received abstracts of the title to the property, and that still later they had paid the Master \$1500.00 and that there still remained due from them the sum of \$2100.00, and ordering the defendants to pay the Master the further sum of \$2100.00.







within five days, and cause to be cancelled and released of record and surrendered to the Master, certain notes and trust deeds appearing against the property, or in lieu thereof, to pay into the Master's hands the further sum of \$2100.00, or in default of doing either of these things, to show cause, in seven days, why the property should not be resold at their risk and expense. In due time the defendants filed their answer to this rule, and the record shows that upon the hearing of this matter the court held that the answer made by the defendants to the rule was insufficient, and the decree which the court had entered, confirming the first sale by the Master, was vacated and set aside in so far as it confirmed that sale, and the court entered an order to the effect that the premises in question be resold at the risk and expense of the purchasers at the first sale. The Master accordingly held another sale. In the meantime the defendants filed a petition for an order directing the Master to return the deposit they had made on the original sale. Later, the Master made a report of the second sale, from which it appears that on this sale the defendants again became the purchasers of the property, for \$2755.00, on account of which bid, they had deposited with the Master the sum of \$80.00 in cash. Following this, the court entered a decree confirming the second sale, finding that the reasonable costs and fees of the Master incident to the second sale, was \$34.20, and directing that the same be taxed as costs and paid out of the sum of \$1500.00 remaining in the hands of the Master on account of the former sale. This decree further recited that it appeared that the defendants had bid \$3600.00 on the first sale and paid in the sum of \$1500.00, and had failed to show any good or sufficient cause for their failure to pay the balance, wherefore, a re-sale had been ordered at their risk and expense and further that on the resale of the premises the defendants had again



purchased the property for \$2785.00 and that on account of the resale, there was therefore a loss of \$845.00 in addition to the expense of the resale. The decree then ordered that the defendants be charged with this sum of \$845.00, and directed the Master to retain that amount out of the \$1500.00 held by him, which the defendants had paid in on the first sale, or that it be charged against the purchase price of \$2785.00, as soon as it might be paid. The decree then recited that it further appearing to the court that out of the sum of \$1500.00 paid on the first sale, there remained in the Master's hands the sum of \$650.00, it was ordered that the defendants be given credit for that amount by the Master upon the purchase price at the second sale, and that the defendants pay the balance to the Master within ten days from the delivery of abstracts of title. It was further decreed that upon receiving the balance of the purchase price, the Master make proper conveyances to the defendants, and on receiving the purchase price, return the same to the court with the proper order of distribution.

The appeal which the defendants have perfected is an appeal from the decree of the trial court approving the Master's report of resale.

In his statement of the case the counsel for defendants says that "the only dispute that arose in the whole matter was over the accounting by John J. Garrity for the rents for improved property." Reference is then made to the disputed items involved in the accounting, which counsel says makes up "the whole issue before the court."

We understand that the defendants contend in support of their appeal that; (a) the trial court should have ordered the Master to return to them, the \$1500.00 paid in at the first







sale; (b). that their objections to the Master's report on the accounting should have been sustained.

The order of resale made no reference to the \$1500.00 in the hands of the Master, which defendants had paid in on the first sale. When the resale was had, and it appeared from the report of the Master thereon that the defendants were again the purchasers, it was entirely proper for the court to decree that the \$1500.00 in the hands of the Master, by reason of the defendants' purchase at the first sale, be treated as a payment by them on the second sale. That was the effect of the terms of the decree appealed from, so far as they affected this \$1500.00.

The objections of the defendants to the report of the Master, on the accounting, are not properly before us. They are in no way involved in this appeal, which is from the decree confirming the resale of the premises in question. That decree does not mention, nor does it take into account or dispose of, any of the items mentioned in the Master's report on the accounting.

The court, in the decree appealed from, properly charged against the defendants, both the costs (\$54.20) and the loss (\$845.00) incident to the resale of the premises. The resale was carried out properly and in compliance with the law. Hill v. Hill, 58 Ill. 239.

Defendants argue that it was error to sustain the Master's supplemental report on the accounting, in which attorney's fees were "allowed and taxed as costs." The Master's supplemental report recommends an allowance of attorney's fees to solicitors for complainants. The record does not show what, if any, disposition was made of the exceptions of defendants to this report



nor does the record disclose any order by which this item of fees was taxed as costs. It was not so taxed, nor is it mentioned in any way, in the decree appealed from and it is therefore not involved on this appeal.

It seems further to be the defendants' contention that it was error to order a resale of the premises in question, pending a settlement of the dispute between the parties over the accounting. This, likewise, is a question not involved on this appeal. So far as the record discloses there was neither objection nor exception taken by the defendants to the order of the court finding their answers to the rule entered on them to complete the first purchase or show cause why the premises should not be resold at their risk and expense, wholly insufficient, setting aside that part of a prior order or decree by which the first sale was confirmed and directing the Master to resell the premises. The defendants are in no position to urge the matter now.

So far as the record shows, no exceptions were ever filed by the defendants to the report of the Master on the resale of the premises in question, on which the decree appealed from was entered, as contemplated by the statute (ch.106, sec. 29) and we are unable to see from the record, any reason why the decree as entered was in any way erroneous.

The decree appealed from is, therefore, affirmed.

DECREE AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.





36 - 27483

MILDRED SABUER,

Defendant in Error.

v.

THOMAS TRACY and OLIVE TRACY,  
his wife,

Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

229 I.A. 646

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

Plaintiff brought an action of attachment against the defendants seeking to recover \$676.00, which amount is made up of seven items, claimed as damages suffered by her by reason of the defendants' refusal to carry out a contract entered into with plaintiff whereby plaintiff was to purchase from them a certain piece of real estate in Chicago. The affidavit shows defendants are residents of California. The writ was levied on certain real estate in Chicago and served on other parties as garnishees. Afterwards on July 12, 1921, the written appearance of the defendants was filed by Attorney Albert Schaffner. On August 4 following the case was heard before the court without a jury. The court sustained the attachment and entered a finding and judgment in favor of plaintiff for \$600.00. The garnishees were discharged. On September 21, 1921, the defendants by their attorney, R. L. Carmody, moved the court that the judgment be vacated and set aside, and in support of the motion two affidavits were submitted. The motion was overruled. A writ of error has been issued out of this court and the entire record is before us for review.



It is contended that the court should have set aside the judgment on the ground that the attorney who entered the defendants' appearance was not authorized to do so. In the view we take of the case it is unnecessary for us to pass upon this point for the reason that the judgment must be reversed because the evidence does not support the items set up in plaintiff's statement of claim. The first item in the statement of claim is for board for plaintiff and her family from May 1 to the date of the suit, \$90.00. There is not a word of evidence to support this item. The next item is \$25.00 paid for examining an abstract. There was some evidence offered tending to show that a person other than an attorney at law had examined an abstract, and upon objection this evidence was excluded, so that there is no evidence in the record to sustain this item. The next item is one of \$56.00 that plaintiff claims she was compelled to pay to have certain of her furniture moved and stored. She offered evidence tending to show that she had incurred for this \$40.85. The next item is for \$35.00 which amount plaintiff claimed she would have to spend when she was able to rent a flat to have the furniture moved back again. There was no evidence of this at all. Nor could there be, because it was too uncertain. The next item is one of \$246.00, being increased rental for twelve months at the rate of \$20.50 per month which plaintiff claimed she would be compelled to pay. No evidence was offered tending to prove this fact. The next item is one of \$5.00 which plaintiff claims as a loss of interest on account of a deposit she made. There was some evidence tending to show that plaintiff had made a deposit of \$200.00, but it is entirely inefficient to support the item of \$5.00. The last item in plaintiff's statement of claim is for \$225.00, which plaintiff claims she has been compelled





to expend in time and effort in looking for a flat for rent, and that her time and services spent for that purpose were reasonably worth that amount. There is some testimony that plaintiff had been looking for a flat or apartment but not a word that would warrant the allowance of any part of this item. Some evidence should have been introduced.

Since the evidence in the record does not support any of the items in plaintiff's statement of claim, the judgment cannot stand and it will accordingly be reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, F.J. AND TAYLOR, J. CONCUR.



Opinion filed Apr. 11, 1923.

JOSEPH J. ONIONS,

Plaintiff in Error.

v.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

PERCY B. COFFIN, JOSEPH P.  
GEARY, ALEXANDER JOHNSON,  
Civil Service Commissioners  
of the City of Chicago, and  
H. E. WALLACE, Secretary of  
said Civil Service Commission,

Defendants in Error.

229 I.A. 645<sup>2</sup>

MR. JUSTICE O'DONNOR delivered the opinion of  
the court.

Joseph J. Onions filed a petition for a writ of  
certiorari in the Superior Court of Cook County directed  
against the Civil Service Commissioners of Chicago and the  
secretary of the commission to certify to the court proceed-  
ings had before the commission involving Onions' discharge  
by the commission as a civil service employee. The defendants  
filed their return to the writ. A motion of the petitioner  
to quash the proceedings of the commission was overruled, and  
a motion of the defendants to quash the writ of certiorari  
was allowed and the petition dismissed, to reverse which the  
petitioner prosecutes this writ of error.

The record discloses that petitioner was working  
for the city in its classified service as an arlight trimmer;  
that he was suspended, charges filed against him, and after  
a hearing he was discharged. The contention of the petitioner  
is that the finding of the commissioners against him is in-  
sufficient. That finding is as follows: "Upon investigation



The following table shows the results of the survey.

Table 1

The survey was conducted on a grid system. The grid was divided into 100 squares, each measuring 100 feet by 100 feet. The squares were numbered 1 through 100. The survey was conducted in a systematic manner, starting from the top left corner and moving in a zig-zag pattern. The results of the survey are shown in the following table. The table lists the number of points found in each square, the type of points found, and the location of the points. The points were found in 45 squares, and the total number of points found was 125. The points were found in the following locations: 10 points in square 1, 15 points in square 2, 20 points in square 3, 25 points in square 4, 30 points in square 5, 35 points in square 6, 40 points in square 7, 45 points in square 8, 50 points in square 9, 55 points in square 10, 60 points in square 11, 65 points in square 12, 70 points in square 13, 75 points in square 14, 80 points in square 15, 85 points in square 16, 90 points in square 17, 95 points in square 18, 100 points in square 19, 105 points in square 20, 110 points in square 21, 115 points in square 22, 120 points in square 23, 125 points in square 24, 130 points in square 25, 135 points in square 26, 140 points in square 27, 145 points in square 28, 150 points in square 29, 155 points in square 30, 160 points in square 31, 165 points in square 32, 170 points in square 33, 175 points in square 34, 180 points in square 35, 185 points in square 36, 190 points in square 37, 195 points in square 38, 200 points in square 39, 205 points in square 40, 210 points in square 41, 215 points in square 42, 220 points in square 43, 225 points in square 44, 230 points in square 45, 235 points in square 46, 240 points in square 47, 245 points in square 48, 250 points in square 49, 255 points in square 50, 260 points in square 51, 265 points in square 52, 270 points in square 53, 275 points in square 54, 280 points in square 55, 285 points in square 56, 290 points in square 57, 295 points in square 58, 300 points in square 59, 305 points in square 60, 310 points in square 61, 315 points in square 62, 320 points in square 63, 325 points in square 64, 330 points in square 65, 335 points in square 66, 340 points in square 67, 345 points in square 68, 350 points in square 69, 355 points in square 70, 360 points in square 71, 365 points in square 72, 370 points in square 73, 375 points in square 74, 380 points in square 75, 385 points in square 76, 390 points in square 77, 395 points in square 78, 400 points in square 79, 405 points in square 80, 410 points in square 81, 415 points in square 82, 420 points in square 83, 425 points in square 84, 430 points in square 85, 435 points in square 86, 440 points in square 87, 445 points in square 88, 450 points in square 89, 455 points in square 90, 460 points in square 91, 465 points in square 92, 470 points in square 93, 475 points in square 94, 480 points in square 95, 485 points in square 96, 490 points in square 97, 495 points in square 98, 500 points in square 99, 505 points in square 100.

The survey was conducted on a grid system. The grid was divided into 100 squares, each measuring 100 feet by 100 feet. The squares were numbered 1 through 100. The survey was conducted in a systematic manner, starting from the top left corner and moving in a zig-zag pattern. The results of the survey are shown in the following table. The table lists the number of points found in each square, the type of points found, and the location of the points. The points were found in 45 squares, and the total number of points found was 125. The points were found in the following locations: 10 points in square 1, 15 points in square 2, 20 points in square 3, 25 points in square 4, 30 points in square 5, 35 points in square 6, 40 points in square 7, 45 points in square 8, 50 points in square 9, 55 points in square 10, 60 points in square 11, 65 points in square 12, 70 points in square 13, 75 points in square 14, 80 points in square 15, 85 points in square 16, 90 points in square 17, 95 points in square 18, 100 points in square 19, 105 points in square 20, 110 points in square 21, 115 points in square 22, 120 points in square 23, 125 points in square 24, 130 points in square 25, 135 points in square 26, 140 points in square 27, 145 points in square 28, 150 points in square 29, 155 points in square 30, 160 points in square 31, 165 points in square 32, 170 points in square 33, 175 points in square 34, 180 points in square 35, 185 points in square 36, 190 points in square 37, 195 points in square 38, 200 points in square 39, 205 points in square 40, 210 points in square 41, 215 points in square 42, 220 points in square 43, 225 points in square 44, 230 points in square 45, 235 points in square 46, 240 points in square 47, 245 points in square 48, 250 points in square 49, 255 points in square 50, 260 points in square 51, 265 points in square 52, 270 points in square 53, 275 points in square 54, 280 points in square 55, 285 points in square 56, 290 points in square 57, 295 points in square 58, 300 points in square 59, 305 points in square 60, 310 points in square 61, 315 points in square 62, 320 points in square 63, 325 points in square 64, 330 points in square 65, 335 points in square 66, 340 points in square 67, 345 points in square 68, 350 points in square 69, 355 points in square 70, 360 points in square 71, 365 points in square 72, 370 points in square 73, 375 points in square 74, 380 points in square 75, 385 points in square 76, 390 points in square 77, 395 points in square 78, 400 points in square 79, 405 points in square 80, 410 points in square 81, 415 points in square 82, 420 points in square 83, 425 points in square 84, 430 points in square 85, 435 points in square 86, 440 points in square 87, 445 points in square 88, 450 points in square 89, 455 points in square 90, 460 points in square 91, 465 points in square 92, 470 points in square 93, 475 points in square 94, 480 points in square 95, 485 points in square 96, 490 points in square 97, 495 points in square 98, 500 points in square 99, 505 points in square 100.



of within charges, we find that annotee stating the time when and the place where this investigation was to be held, together with a copy of the charges herein, was duly served on said Henry A. Cord and Joseph J. Onions more than five days prior to this investigation by registered mail; and the said Henry A. Cord and Joseph J. Onions appeared in person and were represented by counsel. Whereupon the witnesses were sworn and their evidence was heard by the commission. And we further find from the evidence that the said Henry A. Cord and Joseph J. Onions are guilty as charged in the within and foregoing charges, and order that they be discharged from the Dept. of Gas and Elec. and from the service of the City of Chicago."

The argument of petitioner is that the finding of the commission removing him from his position stated no evidence or any facts justifying the removal, the only finding being that he was guilty "as charged." In a recent opinion handed down in the case of Henry A. Cord v. Coffin, et al., 17068, we held this same finding insufficient, basing our decision on the holding in the case of Funkhouser v. Coffin, 302 Ill. 487. What we there said is applicable here, because it appears that the finding made against petitioner and Cord was the same. They were tried at the same time and one finding entered against both. It follows, therefore, that for the reasons stated in the opinions in the Cord and Funkhouser cases the judgment of the Superior Court of Cook County was wrong and it is reversed and the cause remanded with directions to quash the proceedings of the Civil Service Commission.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON, P.J. AND TAYLOR, J. CONCUR.



Opinion filed Apr. 11, 1925.

ANNA BILEK,

Appellee.

APPEAL FROM

v.

CIRCUIT COURT,

COOK COUNTY.

JOHN J. GARRITY, Superintendent  
of Police, et al., On  
appeal of THATCHER W. HOYT,

Appellant.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Anna Bilek brought an action of replevin against John J. Garrity, Superintendent of Police of Chicago, to recover possession of an automobile which she claimed belonged to her. The car was taken under the writ and delivered to her. Thatcher W. Hoyt intervened claiming the car in question was his property. Upon the trial the jury returned a verdict finding the right of property in plaintiff and assessing her damages at \$175.00, to reverse which Hoyt prosecutes this appeal.

The evidence discloses that the defendant Hoyt in March, 1916, purchased a Peerless automobile from the Haghey Motor Company of Chicago, which company was the local agent of the Peerless Company; that Hoyt used the car until about May 22, 1917, when he purchased another Peerless and traded in the old car as part payment. He used the second car from the time he purchased it until some time in 1918 when he purchased a third car of the same make from the same company, leaving the second car, which was later to be returned to him, with the agency. While the second car was in the agency's possession, and sometime during the month of August, 1918, it was stolen. Hoyt appears to

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have been unable to locate it after that time and nothing was heard from it until about June 26, 1920, when the city police claimed to have found it in a garage at 1214 West Congress street, Chicago. At that time the car was in the possession of Charles Kotek who claimed to have purchased it from one John J. Fields on February 23, 1919. About a year later, January 26, 1920, Kotek claims to have sold or given the car to plaintiff, his mother-in-law, with whom he was living at the place where the police found the car. When the police first saw the car they ascertained the engine number and serial number and checked them with the police records of stolen automobiles. The following day they took the car and Kotek to the Detective Bureau and from there called Hoyt over to identify the car. Hoyt examined the car and stated that it was his. Kotek was then placed under arrest. Three days later, the car still being in the possession of the police, plaintiff brought this suit. The foregoing facts are undisputed.

The only controverted question in the case was whether the car belonged to Hoyt. Kotek testified that in February, 1919, he was conducting a saloon and restaurant and that Fields, from whom he later purchased the car, was one of his regular customers and that he had known him for a couple of years prior to that time; that he saw Fields driving the car for about six months before he purchased it; that on February 23, 1919, he bought the car from Fields for \$1150.00 paying \$150.00 down; that a bill of sale was made out on that date but was not delivered to him until he paid the balance of \$1,000.00, which was about two weeks thereafter; that at that time he drew a check to his own order for \$1,000.00, had it cashed, paid the money to Fields and received the bill of sale. The bill of sale was offered in evidence by the plaintiff and describes the car as "A seven year-

[illegible][illegible]

enger Peerless car, Model 36 - 1917 - Engine No. 33323." The witness further testified that he used the car until about January 26, 1920, when he executed and delivered a bill of sale for it to his mother-in-law but that she did not pay him anything for it, that it was merely a gift. That bill of sale was offered in evidence and describes the car as a seven passenger Peerless touring car, "Model 36, No. 170428, Engine No. 33323." Plaintiff also offered in evidence a license obtained by her from the secretary of State. Kotick further testified that about June 27, 1920, he was cleaning the car in his garage at 1214 West Congress Street when two city detectives came along and stated that they were detailed on stolen automobiles; that the officers examined the numbers on the car and stated that they thought the numbers corresponded with the numbers of a car that had been reported stolen; that they further stated they would investigate and advise the witness. The next day they telephoned the witness's wife and told her they were coming to get the car. When they arrived the witness was there and they told him the car had been stolen. The witness voluntarily drove them to the Detective Bureau. He told them he had a bill of sale for the car in the bank. They placed him under arrest and when the matter was heard in the police court he was discharged, no witness appearing against him. He further testified that he saw the police using the automobile and that he had his mother-in-law bring the replevin suit. On cross-examination he testified that he thought Fields was in the manufacturing business but that he did not know where he lived; that he heard that Fields was in business about two blocks from where the witness lived but that he had never seen Field's place. He further testified that the numbers on the bill of sale were the same as the numbers on the car; that the number on the engine and the number on the chassis iron "that runs



[illegible]



along on the truck is the same number that is punched out on the engine, and that number is 33343." He further testified that he did not mean the number on the chassis; that he never looked at that part of the machine; that he did not know what number was on the chassis. The witness further testified that while the car was held by the police, and after he had heard a Mr. Cooley's name mentioned in connection with it, he went to see him in the Old Colony Building to learn if the car had been stolen; that he saw Mr. Cooley and the latter stated he did not want to have anything to do with it.

Edward Dettman, for the defendant, testified that he was and had been a police officer for a number of years, working in the automobile department for about two years; that his duties were to investigate stolen automobiles; that in the latter part of June, 1920, he and his partner Officer Woodrich went to plaintiff's premises on West Congress Street, walked down an alley and looked at the car in question; that he looked at the motor number and recollected that he had seen the same number in his book where a record of stolen automobiles was kept; that on the same day he examined the records at police headquarters and saw that the car in plaintiff's garage had been stolen in 1918 from Flymouth Place and Van Buren Street; that Mr. Cooley had reported the car as stolen; that the numbers on the car corresponded with the numbers in the police records; that the motor number was 2715; that the serial number on the brass plate was wrong and appeared to have been changed; that the number stamped on the channel iron was 170539; that that number was not the same as the one on the brass plate; that the brass plate was removed and bore the number 170428; that the plate appeared to have been tampered with. The original plate is before us. The witness further testified that



the day after they took the car to the Detective Bureau and notified Hoyt he came over and identified it as his car, and gave the witness permission to use the car over Sunday; that the brass plate was taken off the dashboard of the car on the day the car was discovered or the day after; that he used the car from June 26 to June 30.

Joseph Capp testified that he was the police custodian of property that was claimed to have been stolen and turned in to the city garage; that when any property is turned in an inventory is made. He produced an inventory of a Peerless automobile, motor No. 2715, serial No. 170539, being the car taken from Hoyt. The record is not clear how the witness got these numbers.

A witness from the Hughey Motor Company testified to records of sales kept by that company and there was put in evidence the record of the sale of Hoyt on May 23, 1917, of a Peerless touring car "Model 56, Style body, 7 passenger touring \* \* \* Car No. 170539"; that in partial payment a 1916 Peerless was taken; that this order was signed by Hoyt as purchaser.

A witness for defendant who was familiar with Peerless automobiles testified that the cars and motors were numbered serially; that the serial number appears on a plate in the driver's compartment and on the right rear end of the frame, a part of the chassis; that the highest factory number of a Peerless which was issued up to the date of the trial was 21,131, which was the number of a car that had been sold about a week before the trial; that that was a 1922 car.

Calvin B. Beach testified for the defendant that he had known Hoyt for about 20 years; that in 1917 he had ridden with Hoyt in his Peerless car about 30 times; that it was a seven



The day after that day the car was taken to the garage and  
 called by the name and identified as the car, and  
 gave the witness permission to use the car for the day;  
 from this was taken all the documents of the car as the day  
 the car was delivered at the day after; that he used the car  
 from June 26 to June 28.

Though they testified that he was the owner of the car  
 of property that was taken to have been stolen and taken in  
 to the city garage; that when the property was taken in the house  
 they in made. He produced an inventory of a household article,  
 master Mr. WIS, serial No. 17117, being the car taken from the  
 The record is not clear how the record was taken.

A witness from the garage today testified to  
 records of which kept by that company and there was no in-  
 ventory of the car as taken on May 26, 1934, at a time  
 from which was taken in, this being, a photograph taken of a  
 car No. 17117; that in serial number a 1934 license was  
 taken; that this car was taken by the garage.

A witness for the defense was also called at the trial  
 and testified that the car was taken from the garage and  
 taken; that the serial number of the car was taken from the  
 document and the right was not at the time, a part of the  
 document; that the witness today of a photograph which was  
 taken on the day of the trial was 17117, which was the same  
 one of a car that was taken with which a word before the trial; that  
 that was in June 28.

John H. Brown testified for the defense that he had  
 known the car since 1934; that in 1934 he had taken with  
 him in his business was about 17117; that it was a car



passenger touring car; that there was a luggage carrier on the rear of the car and that holes were bored in the frame for the purpose of attaching the carrier; that he went with Hoyt, after the car had been recovered by the police, to the detective bureau and examined the car; that the car there exhibited was Hoyt's car, the one the witness testified he had ridden in a great number of times; that he identified it by means of the holes bored in the frame for the luggage carrier, which had in the meantime been removed. Oesley from whom the car appears to have been stolen died prior to the trial.

The defendant Hoyt testified that he purchased a Peerless automobile in 1916 from the Hughey Motor Company and used it about a year; that in May, 1917, he traded it in as part payment for another Peerless; that he used that car for about a year and then purchased a third car from the same company, leaving the old car with the Hughey Company to be later returned; that the last time he saw the car in question was in the summer of 1918 until he saw it in front of the Detective Bureau in June, 1920; that he recognized the car as being the second one he bought from the Hughey Company by the holes that had been drilled in the frame for the luggage rack; that these holes were bored shortly after he bought the car.

Officer Woodrich testified that in June, 1920, he and Officer Betts saw the car at plaintiff's garage and that they examined the motor and serial number; that the serial number on the plate had been tampered with; that at that time he told Kotch that the car had been stolen; that on the next day, after examining the records at detective headquarters, they took Kotch to the detective bureau and called Hoyt to identify the car; that Hoyt



examined it and stated that it was his; that the brass plate showing the serial number was removed by Detmen. He further testified that the serial number on the brass plate appeared to have been tampered with, especially the figure 7.

William Duncan testified by deposition that he lived in Montreal, Canada; that he purchased a Peerless automobile in March, 1920; that the serial number of the car was 170423, and the engine number 3645; that it was in his garage at Montreal every day during the month of June, 1920, and that he still had it at the time his deposition was taken.

A witness for the defendant testified that an automobile similar to the one in question might be rented for from \$40.00 to \$60.00 per week.

The following special interrogatory was submitted to the jury: "Was the automobile when taken by the sheriff under the writ of replevin issued in this writ, the property of Thatcher W. Hoyt? A. No."

A great many of the given instructions were wrong, but in this opinion we will refer to but one of them. The first one given on behalf of plaintiff instructed the jury that before the plaintiff could recover she must prove by a preponderance of the evidence that the automobile taken under the writ of replevin was the automobile which she bought from Kotek; that if she had not established such fact by a preponderance of the evidence, then she could not recover, but if she had so established that fact, the verdict should be in her favor. Of course, this was entirely wrong. There was no controversy but that the automobile in question was the one she obtained from Kotek, but she would not be entitled to a verdict if the automobile belonged to Hoyt. This



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1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a very important document, as it contains the President's views on the state of the Union and the progress of the war. It is a very long letter, and it is written in a very formal style. It is a very important document, as it contains the President's views on the state of the Union and the progress of the war. It is a very long letter, and it is written in a very formal style.

...and the ... ..

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instruction directed a verdict and for that reason the error was not obviated by other instructions. With this in mind, very little effect could be given to the finding of the jury on the special interrogatory above quoted.

We have carefully considered all the evidence in the record and are of the opinion that the contention of the defendant Hoyt that the finding of the jury is against the manifest weight of the evidence must be sustained. The only substantial evidence of the plaintiff is that Kotek purchased the car from Fields and obtained a bill of sale which gave the number as 33323, while the bill of sale from Kotek to his mother-in-law, the plaintiff, gives the same engine number and in addition the serial number as 170428. The evidence of the two police officers was that the engine number was 2715 and that the serial number was 170539. This latter number was stamped in the channel iron. The brass plate which purported to give the serial number as 170428, and which is before us, clearly shows that the plate has been tampered with. It is but a thin piece of plate that fastens to the car by a small nail or screw in each corner which could be easily removed. The number on the channel iron is testified to by the police, and is shown by the records of the Hughey Company, and was not tampered with at all. Moreover, Hoyt and the witness Beach positively identified the car by means of distinguishing marks, such as the holes that had been drilled for the luggage carrier. We are clearly of the opinion that the car in question was Hoyt's car and that the verdict of the jury to the contrary is against the manifest weight of the evidence. The jury were probably misled by the erroneous instruction. Moreover, they seem to have disregarded the evidence in fixing the amount of the damages at \$175.00. The only evi-



dence in the record is that a car similar to the one in question might be rented for not more than \$60.00 per week. It was not out of plaintiff's possession for more than five days. How they arrived at the amount of \$175.00 does not appear in the record. There is no evidence to base it on.

The judgment of the Circuit Court of Cook County is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

THOMSON, F.J. AND TAYLOR, J. CONCUR.

FINDING OF FACT:

We find as an ultimate fact that the automobile in question at the time of the suing out of the replevin writ in this case was the property of Thatcher W. Hoyt, and that he was entitled to possession of it at that time.

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CHARLES F. CAMPBELL and  
DAVID F. MATCHETT, as  
Executors of the Last  
Will and Testament of  
DAVID C. CAMPBELL, Deed.,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

v.

LE ROY HUTCHINSON,

Appellee.

229 I.A. 345

MR. JUSTICE O'CONNOR delivered the opinion  
of the court.

Plaintiffs brought a fourth class contract case in the Municipal Court of Chicago against the defendant to recover the balance due on a promissory note and contract. The contract was for the purchase of a piece of real estate and the note was made and executed by the defendant in evidence the balance due on the purchase price. There was a verdict and judgment in favor of the defendant to reverse which the plaintiffs prosecute this appeal.

In the statement of claim filed, plaintiffs alleged that the defendant was indebted to them in the sum of \$432.57 with interest thereon at the rate of 6% per annum "on the promissory note and written contract executed by the defendant and delivered to the plaintiffs in words and figures as follows:" the note and contract were then set forth. The note is the usual installment note for \$440.00 to the order of the plaintiffs and signed by the defendant. It is payable in installments of \$8.00 per month with interest, and contains a provision that if default be made in any of the installments, the entire amount may be declared due at the option of the



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plaintiffs. The contract is in the nature of a receipt from the plaintiffs to the defendant for \$10.00 on account of the purchase price of a certain described lot. It further states that plaintiffs have that day sold the lot to the defendant for \$450.00, \$10.00 cash and \$2.00 per month thereafter; that the purchaser, defendant, is to pay all general taxes and special assessments for improvements not yet made; that the plaintiffs will give defendant a deed for the lot when the entire purchase price is paid, and that they will also give him a merchantable abstract showing the title to be free and clear at the time of delivery of the deed. It contains a further provision that in case default be made in the payment of any of the installments the plaintiffs have the right to declare the balance immediately due and payable. The statement of claim alleged that default had been made and that plaintiffs had declared the entire balance due.

The defense interposed, as set forth in the amended affidavit of merits was to the whole of plaintiffs claim to the effect that on May 30, 1921, plaintiffs showed defendant a certain lot which was represented to be lot 9 and advised the defendant that it was for sale for \$450.00; that relying upon such representations the defendant signed the promissory note and contract in suit; that he paid \$10.00 cash; that he afterwards paid another installment; that on or about July 15 following the date of the purchase the defendant again visited the lot which was shown to him prior to entering into the contract, for the purpose of clearing off the weeds from the lot. He was then informed by persons living in the vicinity that the lot which had been shown him by the plaintiffs, and from which he was cutting the weeds, was lot 10 and not lot 9.





The affidavit further set up that lot 9 was not as desirable as lot 10 because there were many trees growing on lot 9 which would have to be grubbed out before defendant could build on the lot; that plaintiffs were informed by defendant that he had not purchased lot 9 but that he had purchased lot 10, the one that was shown to him prior to entering into the contract, and further advised the plaintiffs that he would not complete the payments on the contract because it called for lot 9, and the defendant demanded back the money he had paid.

On the trial of the case plaintiffs offered the note and contract in evidence, and by computation proved the amount still remaining unpaid. The evidence also tends to show that on May 30, 1941, which was a holiday, plaintiffs had advertised and were selling a number of lots in Oak Lawn, which is south-west of Chicago; that the defendant and his wife attended the sale on the day in question and a representative of plaintiffs was there exhibiting and selling the lots; that there was a stake driven in the ground describing the lot and block and stating the price; that plaintiffs' representative showed a certain lot to the defendant and his wife, on which lot a stake was driven giving the description as lot 9, block 10, etc., and the price as \$450.00; that after looking over the lot the defendant agreed to purchase it and thereupon paid plaintiffs' representative \$10.00. Afterwards the note and contract were executed and defendant paid another installment. After this and on July 4 following, which was another holiday, the defendant and his wife again went to the lot for the purpose of cutting the weeds. Defendant was in the act of doing so when he was advised by a neighbor that the lot on which he was cutting the weeds was not lot 9 but that it was lot 10, adjoining lot 8; that he

The following is a list of the names of the persons who were present at the meeting held on the 1st of January 1911, at the residence of Mr. J. H. Smith, at the corner of 1st and 2nd streets, New York City. The names are given in alphabetical order, and are followed by the names of the persons who were present at the meeting held on the 1st of January 1911, at the residence of Mr. J. H. Smith, at the corner of 1st and 2nd streets, New York City. The names are given in alphabetical order, and are followed by the names of the persons who were present at the meeting held on the 1st of January 1911, at the residence of Mr. J. H. Smith, at the corner of 1st and 2nd streets, New York City.

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examined lot 9 and that it was not nearly as desirable as lot 10 and was not the lot that was exhibited to him at the time he entered into the contract of purchase.

There is some discrepancy in the evidence as to just where the stake was driven at the time the purchase was made, and it is argued by the plaintiffs that the evidence is insufficient to show that it was driven in lot 10 instead of lot 9. We think it would serve no useful purpose to analyze the evidence in this regard, but upon a careful consideration of all of it, we think the jury were warranted in finding that the lot exhibited and on which the stake was driven at the time of the purchase was lot 10 and not lot 9. The evidence further shows that after July 4 when defendant was advised that he was cutting the weeds from the wrong lot he conferred with plaintiffs and told them of the mistake and that he would not continue to make the payments because lot 9 was not the lot he purchased, and the defendant, having refused to make any further payment, plaintiffs declared the balance due on the note and instituted the instant suit.

1. Plaintiffs first contend that the judgment is wrong and should be reversed because their suit is based on a written contract under seal and that this contract mentioned lot 9; that it cannot be varied in any respect unless it were shown that there was fraud in the execution of the contract; that the evidence failed to show any such fraud and, therefore, the defense was unavailing. There are two sufficient answers to this contention. First: No such contention was made by plaintiffs on the trial of the case. When the defendant offered his evidence to the effect that the lot which had been exhibited to him and which he



...and that I will not be held responsible for the same.  
 It will not be the fault of the witness if the same  
 be not in the interest of the witness.

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intended to buy was lot 10, no objection was made nor was it pointed out that this was improper because the contract in suit was under seal. It is elementary that the plaintiffs will not now be permitted to shift their position and raise a contention here that was not raised at the trial. The second answer to the contention is that the suit is not based on the written contract under seal. The most that can be said in plaintiffs' favor is that it is based on the promissory note and the contract, and beyond any question the evidence offered was perfectly proper in a suit on the note. Whether it was proper if the suit were based on the contract alone need not be decided here.

2. The plaintiffs further contend that there was no fraud even if the facts were as contended by the defendant, because the most that can be said is that there was an innocent mistake. We think that plaintiffs' contention in this respect is probably borne out by the record, but even if this were true, plaintiffs ought not be permitted to recover. If they intended to sell lot 10 which was exhibited to the defendant, and the defendant intended to purchase lot 10, and then described lot 9 in the deed, which was not as desirable as lot 10.

3. Plaintiffs further complain that the court erred in permitting a witness for the defendant to testify to a conversation which she had with plaintiffs' agent, after defendant claimed to have discovered the mistake. The testimony was to the effect that after the defendant had discovered that there had been a mistake, he went to plaintiffs' agent, McClinton, and stated the facts to him and that McClinton admitted that there had been a mistake. In this connection it is argued that the only authority of the agent was to enter into a contract for the sale of the lot, and that this did not authorize



McClintock to make any admissions that would prejudice the rights of plaintiffs. McClintock exhibited the lot to the defendant at the time of the sale and apparently was in entire charge of the matter. We think there was no error in the ruling of the court in admitting in evidence the conversation.

4. It is next contended by the plaintiffs that the judgment is wrong because the plaintiffs were suing as executors and the judgment which was entered against them for costs awarded an execution instead of requiring that the judgment be paid in due course of administration. This contention of the plaintiffs must be sustained. It has often been held in cases similar to the one before us that it is improper to award an execution. This is purely a technical error as to the form of the judgment and may be corrected here. The judgment will, therefore, be modified by striking from it that part which awards the execution and providing in lieu thereof that the judgment shall be paid in due course of administration.

Plaintiffs' other points which we have considered, do not warrant us in disturbing the judgment. Upon a consideration of the whole record we think the judgment should stand as modified. The judgment of the Municipal Court of Chicago is, therefore, modified and affirmed.

JUDGMENT MODIFIED AND AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.





113 - 27587

Opinion filed April 11, 1933.

CYRUS SHANK,

Appellee,

v.

CHICAGO AUTOMATIC MACHINE  
COMPANY, a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

229 - A. 218

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

By this appeal the defendant seeks to reverse a  
judgment entered on the verdict of a jury for \$2250.00, being  
the amount plaintiff claimed as back salary for services ren-  
dered to the defendant at the rate of \$50.00 per month from  
February, 1912, to October, 1915, both inclusive. On a former  
trial of this case before the court without a jury there was  
a finding and judgment in plaintiff's favor for the same amount.  
On appeal to this court the judgment was reversed and the cause  
remanded on account of the rulings of the trial judge in exclud-  
ing certain evidence. Shank v. Chicago Automatic Machine Company,  
218 Ill. App. 643, (abstract opinion).

Upon a re-trial of the case before a judge and a jury  
the evidence which had been excluded on the first trial was ad-  
mitted and there is no complaint now made in this respect by the  
defendant. The court in this case specifically and fully in-  
structed the jury, and no complaint is made that the instructions  
were improper, nor is any argument made that the court erred in  
not directing a verdict for the defendant, nor that the verdict  
is against the manifest weight of the evidence. The defendant on  
this appeal makes substantially the same argument that it made



on the former appeal and, therefore, practically all of the questions now raised have been determined adversely to the defendant and the points passed upon in our opinion, which is the law of this case, since the evidence in most respects was not materially different on this trial than on the former one.

The record discloses that plaintiff, who was vice president of the defendant company, worked principally in the shop of defendant; that on February 1, 1910, the board of directors met and passed a resolution which provided, inter alia, that J. H. Jann, president, Cyrus Shank the plaintiff, vice-president, George L. Walker, treasurer, and William J. Walker, secretary, should each be paid a salary of \$150.00 per month; that all of these parties proceeded to perform their respective duties and were paid at the rate of \$150.00 per month, plaintiff drawing various amounts from time to time until February 1, 1912; that in the latter part of January, 1912, the president, treasurer, secretary and plaintiff met informally as plaintiff was just finishing his day's work, which was Saturday. The parties stood around in the plant and the testimony as to what took place is as follows: plaintiff testified that it was on Saturday and that he was preparing to leave the plant, having finished his day's work; that the treasurer, George Walker, was sitting at a desk; that Jann, the president, had come from the factory and was going out; that the secretary, William Walker, was standing some thirty feet away from the other three; that the treasurer said: "There isn't much business and we would have to draw less money for a while." To which Jann replied: "Well, if we need more money, have to have more money, we can draw it, I guess," and that then the treasurer replied that "As soon as we get to making more money - we will draw the money we make to pay the other stockholders six per cent;" that there was nothing said about



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reducing their salaries to \$100.00 per month. He further testified that they were all to draw less money until business got better. Jann, the president, testified for the defendant that the meeting was held substantially as plaintiff testified; that the treasurer Walker there stated that owing to the condition of business "it would be a wise plan to reduce the salaries of the officers from \$1800.00 to \$1200.00 a year."; that the witness stated that he did not think they could carry four salaries at \$1800.00 a year and that it would be a wise plan to reduce them; that the treasurer replied "We got to run on that basis." He further testified that neither the secretary nor the plaintiff said anything; that that was all that was said at that time; that the meeting was held in the office on the first floor and was after the work for the day was over. "Shank had his hat on and ready to go home." George Walker died prior to the trial. William Walker, the secretary, testified but was not interrogated in reference to this meeting at all.

The evidence further shows that after this meeting and beginning February 1, 1912, and up to the time plaintiff left the employ of the defendant on October 31, 1915, each of the parties drew at the rate of \$100.00 per month. No minute was made of the action of the board at the meeting held the latter part of January, 1912, and although several subsequent meetings were held by the board, the minutes of which appear in the record, no reference is made to any reduction of salary. The evidence further shows without contradiction, Jann the president and Shank testifying, that on a number of occasions Shank insisted that he was entitled to the other \$80.00 per month, and at no place does Jann say that he told Shank that he was not entitled to this salary. About the last of October, 1915, the

The witness stated that she had been married to the defendant for a number of years and that she had been living with him at the time of the hearing. She stated that she had been living with him at the time of the hearing and that she had been living with him at the time of the hearing. She stated that she had been living with him at the time of the hearing and that she had been living with him at the time of the hearing.

secretary of the company testified that he credited Jann, George Walker and himself the amount of back salary, \$2250.00, upon the books of the company. No credit, however, was made to Shank. William Walker testified that he was instructed to make these credits by his brother, the treasurer. He stated that on account of the improvement in the business of defendant they were justified in crediting the back salaries. It does not appear why Shank was not credited the same as the other three. A month or two after the plaintiff ceased working for the defendant one George Beidler, who had been interested as a stockholder for some time, obtained control of the company and had the books of account show that there was no back salary due to Jann, George Walker or William Walker. William Walker testified that he never received any part of this \$2250.00. However, he did testify to a settlement he made with defendant whereby it surrendered some \$6,000.00 in notes to him. Beidler and E. S. Hyland, who became interested in the company, testified that about December, 1915, they had several conferences with plaintiff in reference to the business of the company with a view of purchasing his stock, and that on a number of these occasions plaintiff said that neither he, Jann, George or William Walker were entitled to any back salary. This was denied by plaintiff.

On November 2, 1915, two days after plaintiff severed his connection with defendant, he called to get his pay and received a check for \$231.15. At that time he signed a printed receipt or voucher in which it was stated: "In full of account to date, including Shank, Jr., \$231.15." At the bottom was a blank form of receipt in which appeared the following: "Received-- . 19 - - - from Chicago Automatic Machine Company - - - Dollars in full settlement of the above account. Receipt and Return." This was



Secretary of the company testified that he recalled seeing, during  
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signed by the plaintiff. On the back of this appears the following:

"Chicago Automatic Machine Co.  
No. 4730. Amount \$231.15  
Month of Nov. 1915.  
Favor of Cyrus Shank."

It seems that \$68.09 of the amount of the check was payment to Cyrus Shank, Jr., and the balance, \$163.06, to plaintiff for salary at the rate of \$100.00 per month. Plaintiff testified that the check was given to him by William Walker, the secretary, at the time the receipt was signed, and that nothing was said as to what the money was <sup>for</sup> except that Walker stated that part of it was for plaintiff's son. He further testified that Walker did not say that the check was a settlement in full of all demands and claims that plaintiff had against defendant; and further, in reference to the receipt which he signed at that time: "I always signed that; it was the custom to sign those when I draw checks." This evidence is not in any way contradicted, and Walker who testified was not asked concerning it.

1. Defendant contends that the resolution of February 1, 1910, whereby plaintiff claims his salary was fixed at \$100.00 per month was invalid because it was improperly passed. This matter received our careful consideration on the former appeal and we there held that the resolution was sufficient. The court instructed the jury on the re-trial of the case that that resolution was valid, and no complaint is made that the instruction was improper. There is no merit in this contention, and, moreover, the matter has been disposed of adversely to defendant on the former appeal.

2. It is next argued by the defendant that a resolution or by-law of a corporation may be modified, changed or annulled

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

by agreement or usage and acquiescence, and a great many authorities from a number of states are cited. No reference however, is made to the opinion which we rendered in this case on the former appeal where we decided the point in accordance with defendant's contention. It is argued by the defendant that plaintiff's salary was properly reduced from \$150.00 to \$100.00 per month at an informal meeting which was held about January, 1912, and that since plaintiff drew \$100.00 from that time until November 1, 1915, he cannot now be heard to say that the salary was not reduced. The evidence shows without contradiction, by witnesses for both plaintiff and defendant, that on a number of occasions after February 1, 1912, plaintiff was claiming \$50.00 per month, and he did not draw that \$50.00 per month, according to his testimony, for the reason that the business of the defendant was not prosperous at the time but that it was understood that when the business picked up he would be paid his back salary. Whether the salary was reduced was a question of fact for the jury. The court specifically instructed the jury on this point. They found in favor of the plaintiff and no complaint is made that the instruction was not proper nor that the verdict of the jury is against the manifest weight of the evidence. In these circumstances, of course, we would not be warranted in disturbing the judgment. But in no event could we say that the verdict is against the manifest weight of the evidence.

3. The defendant contends that there was an accord and satisfaction by reason of the fact that plaintiff signed the receipt above set forth when he received his last payment, and in support of this the cases of Union Union Coal Co. v. Berlin & Granderiff Co., 215 Ill. 244, and Snow v. Griesheimer, 220 Ill. 106, and other cases are cited. These authorities are the two



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leading cases on this question in our State, and we think they show beyond question that defendant's contention is unsound. In the Canton Coal case the plaintiff brought suit for a balance claimed to be due it from the defendant for coal sold and delivered under a written contract. The defense was made under a plea of accord and satisfaction. The facts were not in dispute. By the terms of the contract plaintiff was required to furnish the defendant a certain quantity of coal. From time to time the defendant complained that plaintiff was not furnishing the coal as provided for by the contract, and that defendant was required to buy coal in the open market at a higher price and that it would hold plaintiff for such losses. Among other things, the defendant was demanding two cars of coal per day and the plaintiff refused to furnish but one. Some of the coal which had been delivered was not paid for and the defendant sent plaintiff a statement charging plaintiff with \$1350.80 which defendant claimed it had been required to pay in excess of the contract price for coal it purchased in the open market. Accompanying this statement the defendant sent a check for \$470.67 enclosed with a letter to plaintiff, which said: "Enclosed please find our check \* \* \* in full of account together with our statement attached. We also enclose debit memorandum for the difference between contract price and what we were obliged to pay in open market for coal purchased during the period of the contract with you on account of your failure to supply our requirements according to such contract." Upon receipt of this letter, check and statement by the plaintiff, the bookkeeper placed the check in plaintiff's safe, and made out a statement showing the amount it claimed from the defendant after giving credit for the amount of the check. The amount so shown, and which plaintiff claimed, was \$1470.09. Plaintiff's representative took this state-



to the defendant's office and presented it to the secretary and treasurer, and there was a controversy, plaintiff claiming that there was still due \$1470.09, and the defendant insisting that it was paid in full. The statement was left with the defendant and plaintiff afterwards put the check through the bank and collected it. On these facts it was held that there was an accord and satisfaction. The court said, (p.247): "To constitute an accord and satisfaction it is necessary that the money or check, or whatever is offered, should be offered in full satisfaction of the demand, and should be offered in such a manner or accompanied by such acts or declarations as amount to a condition that if the party to whom it is offered takes it he does so in satisfaction of his demand. If the offer is made in such a manner, and it is accepted, the acceptance will satisfy the demand, although the creditor protests at the time that the amount received is not all that is due or that he does not accept it in full satisfaction of his claim." The court further said, (p.248): "The check was \* \* \* clearly offered as payment in full of the balance due. \* \* \* Plaintiff could not have understood that it was authorized by the letter to accept the check as a part payment and credit it on the account, leaving a balance due."

In the Show case plaintiff had rented certain premises to the defendant for \$500.00 per month. The defendant contended that afterwards by agreement the rent was reduced to \$416.67, in consideration of certain repairs which she was to make. After the agreement to reduce the rent the defendant paid \$416.67 for the remainder of the term "by checks which on their face were in full of the rent and were offered as full payment." The court said, (p.108): "The checks purported on their face to be in full







payment, and there is no dispute that they were sent as payment in full; that plaintiff's agent so understood it, and that they were received and collected \* \* \*." (p.110): "If a check is offered under such circumstances as amount to a condition that it is to be received in full payment of the demand, an acceptance will satisfy the demand." Continuing the court said: "We do not agree with counsel that the decision in the case of Larce v. Sugar Leaf Dairy Co., 180 N.Y. 367, maintains a contrary rule. The court there held that the question whether the circumstances were such that the plaintiff knew, or should have known, that a check purporting to be in full payment was sent on the condition that its acceptance should operate as a discharge of the claim should have been submitted to the jury. \* \* \* It was not disputed that the checks were offered as payment in full and that they were received and collected."

From these two cases it appears that the payments there made, which were held to amount to an accord and satisfaction, were given on the express condition that they were tendered in full. No such condition appears in the case before us, but the contrary is true. Plaintiff signed a receipt, as was his custom, when he received checks from the defendant which concededly was in payment of plaintiff's salary due him at the rate of \$100.00 per month. Nothing was said at the time about back salary and on the present trial the treasurer, Walker, who gave plaintiff the check and receipt, was not interrogated on the proposition at all. In these circumstances, we think it clear that there was no accord and satisfaction as a matter of law. But the defendant certainly has no ground to complain because the question was submitted under specific instructions



by the court, and the jury found against the defendant. No complaint is made that the instruction was wrong nor that the verdict is against the manifest weight of the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P. J. AND TAYLOR, J. CONCUR.

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121 - 27596

Opinion filed April 11, 1923.

SPENCER KELLOGG & SONS, Inc.,  
a corp.,

Appellant.

v.

INLAND WHITEN LEAD COMPANY,  
a corp.,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

Plaintiff brought suit against the defendant to  
recover \$3196.00 damages claimed to have been sustained by it  
by reason of defendant's breach of a contract entered into be-  
tween the parties. At the close of the plaintiff's evidence  
there was a finding and judgment in defendant's favor, and  
this appeal followed.

The record discloses that plaintiff had four plants  
where it manufactured linseed oil. One was at Buffalo, N.Y.,  
another at Minneapolis, Minn., one at Superior, Wis., and the  
fourth in New York City. It also had a place of business in  
Chicago where it distributed its product. For a number of years  
it had been doing business with the defendant who was in the  
paint and varnish business. On November 26, 1919, a written  
contract was entered into between the parties, and it is damages  
claimed to have been sustained by the plaintiff by reason of  
defendant's breach of this contract that plaintiff seeks to  
recover here.

By the contract plaintiff agreed to sell and deliver  
to the defendant at Chicago 126 barrels of raw linseed oil for

October 1941 (Vol. 11, 1941)

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The number of people in the world is estimated to be about 2.5 billion. This number is increasing rapidly, and it is estimated that by the year 2000, the number of people in the world will be about 4 billion. This increase in the number of people in the world is due to a number of factors, including a decrease in the death rate and an increase in the birth rate. The death rate has decreased because of improvements in medicine and sanitation, and the birth rate has increased because of a decrease in the age at which people have children. This increase in the number of people in the world is a cause for concern, as it is estimated that the world's resources will not be able to support this large number of people by the year 2000.

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The number of people in the world is estimated to be about 2.5 billion. This number is increasing rapidly, and it is estimated that by the year 2000, the number of people in the world will be about 4 billion.

which the defendant agreed to pay a certain specified price. The contract contained the following provision: "Buyer to furnish specifications for shipments in ample time to enable Sellers to ship goods within the periods named. \* \* \* Failure to deliver any installment of oil shall not be a breach hereof as to other installments. \* \* \*

Each delivery on account of this contract shall constitute a separate purchase. Failure to take any portion of the above oil as agreed shall, at seller's option, release them from making other deliveries; \* \* \*

Sellers' obligation to deliver and Buyer's to receive said oil as specified herein is expressly subject to fire, strikes and other causes beyond the control of either. \* \* \*

Shipping Periods: March, 1920, 42 Bbls; April, 1920, 42 Bbls.; May, 1920, 42 Bbls."

Plaintiff delivered none of the oil in March, April or May, but about June 4, 1920, it delivered 24 barrels for which the defendant paid. After that time plaintiff tendered the remaining 94 barrels which the defendant refused to receive, and the plaintiff contends that by reason of this fact the defendant breached the contract on August 13, 1920.

Plaintiff in its statement of claim alleged that at all times during the life of the contract, particularly during the periods named therein for the delivery of the oil, it was ready and willing to perform the contract according to its terms. It undertook to prove this allegation and the evidence in this respect shows without contradiction that plaintiff had no oil at its Chicago plant from March 2 to March 11, 1920. On the

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Finally, the last step in the process is to implement the plan and monitor the results. This involves putting the plan into action and tracking the progress of the solution. Once the problem has been solved, the final step is to evaluate the results and determine if the solution was effective. This involves comparing the results of the solution to the original problem and determining if the problem has been solved. If the problem has not been solved, the process may need to be repeated.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Security Co-ordination Unit (BSCU) in the United States.

CONFIDENTIAL - SECURITY INFORMATION

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latter date it received 160 barrels and four days later, March 15, it received two additional cars of oil, making its total stock 230 barrels. It then began to fill its orders from its several customers so that the stock was practically exhausted April 1. The evidence further shows that plaintiff had no oil at all during the month of May or April; that the defendant on May 11 and again on May 14 requested oil from the plaintiff but was advised that plaintiff had none at that time for delivery. The evidence also shows that during the months of April and May there was a strike involving railroad yardmen in and about Chicago which greatly delayed the shipment of cars; that on May 24, 1920, the plaintiff had two cars of oil on the C.M. & St. P. Ry. Co.'s road switched at its Galewood yard, Chicago, which was about eight miles from its destination. The evidence further shows that about noon on Saturday, May 29, a representative of the plaintiff called up the defendant and said in substance that plaintiff was ready to deliver the 126 barrels of oil at that time; that the defendant replied that it was about closing time and that no oil could be taken in that afternoon nor the day following, which was Sunday, nor the day after that which was a holiday, Memorial Day; that at that time defendant specified the quantity of oil it would take; that thereafter, about June 3, one of the cars from Galewood arrived at its destination, and the other car about June 7, and that 32 barrels of this oil was received by the defendant and paid for. Sometime in July plaintiff wrote the defendant stating that it was ready to deliver the balance of the oil and requesting instructions, but the defendant declined to receive anything farther and on August 13, 1920, plaintiff considered the contract terminated.

Plaintiff contends that under the terms of the contract it could not be in default for failure to deliver unless and un-



til the defendant gave shipping instructions. On the other hand the defendant's position is that it was not required to give any instructions to the plaintiff in this respect, but that it was plaintiff's duty to deliver 42 barrels of oil not later than the last of March, April and May. We think the contract required the defendant to furnish plaintiff with shipping instructions in ample time, and unless it did so plaintiff would not be in default. The contract specifically provides that the buyer is "to furnish specifications for shipment within ample time to enable the sellers to ship the goods within the period named." From this it appears that no specific date is named, and the plaintiff contends it means a reasonable time which, under the circumstances, on account of there being a strike of the railroad yardmen which delayed the movement of cars from 30 to 60 days, the defendant should have given directions, as we understand it, at least 30 to 60 days before the oil was required by it.

The plaintiff further contends that it was not in default because of the railroad strike, and that the contract expressly relieves it in such circumstances. We think the latter contention is correct. But it does not follow that if the plaintiff on account of the strike was relieved from shipping the oil, that it would have an action for damages, because the provisions of the contract relieves both parties of liability in case of strikes. The evidence is uncontradicted that the plaintiff was unable to deliver the oil during April and May because it had none during that period, and, of course, it failed to prove the allegations of its statement of claim in this respect. The first oil which it did have and which might have been available was on March 11, but it is not clear that even then it could have supplied defendant with 42 barrels







due under the contract in March, because the evidence tends to show that it had other customers under contract and on account of the shortage of oil it was pro-rating what it received to its several customers. In any event plaintiff is not seeking to recover for the month of March but for damages suffered on account of the failure of defendant to take the remaining 94 barrels. Plaintiff's position is that since the evidence shows that on May 29, which was during the period covered by the contract, plaintiff offered to deliver all of the oil and the defendant offered to receive it. This extended the time within which the oil was to be delivered. We do not think the evidence sustains such a contention. On May 29 when plaintiff advised the defendant that it had the oil for delivery the uncontradicted evidence is that it had none, and that it received none until June 3 following, and that the defendant did not know on May 29 that the oil was not then ready for delivery, and the evidence is not sufficient to warrant a finding that the defendant agreed on May 29 to take all of the oil. Evidence offered by the plaintiff clearly shows that it was not able and willing to deliver the oil according to the contract. In these circumstances of course the court could only have found for the defendant as was done.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.



154 - 27630

Opinion filed April 11, 1923.

E. H. WARNER,

Appellee.

v.

NEW YORK CENTRAL RAILROAD  
COMPANY, a corp..

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

229-1-646

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

Plaintiff brought suit against the defendant to  
recover \$671.70 which he claimed on account of the negligence  
of the defendant in transporting his automobile from New York  
to Detroit. There was a verdict and judgment in his favor for  
\$605.50, to reverse which this appeal is prosecuted.

The record discloses that on March 31, 1920, plaintiff  
delivered his automobile to the defendant at Kingsbridge Station,  
New York City, for shipment to him at Detroit; that upon receiv-  
ing the car the agent of the company stated he would drain the  
water from the engine, and thereupon a bill of lading was issued  
to the plaintiff. The car was delayed for a month or more and  
when it was received at Detroit it was in a damaged condition.  
This was apparently occasioned by the failure to drain the water  
from the car. Plaintiff was put to considerable expense to have  
the car repaired and it was to recover such damages that this  
suit was brought.

The only point made by the defendant is that since  
this was an interstate shipment plaintiff must show that he  
was the lawful holder of the bill of lading and produce it on

194 - 1288

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the trial or account for its absence. In support of this it is pointed out that under the provisions of section 20 of the Act to Regulate Commerce a common carrier is liable for any damage occasioned by its negligence to the lawful holder of the bill of lading; that the bill of lading constitutes the contract between the parties and, therefore, it being in writing, it must be produced on the trial or its absence accounted for. The evidence shows that plaintiff, who was living in New York and who was about to remove to Detroit, delivered his automobile to the railroad company with directions to ship it to him at Detroit, and that a bill of lading was issued to him at the time of the delivery of the car; that the agent promised to drain the water from the engine of the car, which was not done, and that it was delayed for more than a month; that it arrived in Detroit in a damaged condition occasioning expense to have it repaired. There is no contention made by the defendant that plaintiff was not the lawful holder of the bill of lading, nor that the car was not delivered to the proper person. Plaintiff testified to delivering the car and receiving a bill of lading. No objection was made that his testimony was not the best evidence, nor that the bill of lading, which was a written contract, was the best evidence. This being true, of course, the defendant is in no position now to contend that the best evidence, the bill of lading, was not produced. It is elementary that where a suit is brought upon a written contract and parol evidence is given concerning it, and no objection is made that such evidence is not the best evidence, complaint cannot be made that the contract itself was not offered or the failure to do so explained. In these circumstances it follows that the judgment of the Municipal Court of Chicago must be affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR J. CONCUR.



161 - 27637

Opinion filed Apr. 11, 1923.

MERRELL S. HARRISON, Administrator of  
the Estate of F. L. GROSS, Deceased,

Appellee,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

v.

CHARLES J. JOYCE,

Appellant.

229 I.A. 646<sup>4</sup>

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

Plaintiff brought suit against the defendant to re-  
cover \$653.00 claimed to be the balance due him of the purchase  
price of merchandise sold and delivered. The defendant filed  
an affidavit of merits, and later a set-off, claiming there was  
due him \$2930.00. Afterwards the defendant withdrew this set-  
off and filed an independent suit against the plaintiff claim-  
ing the same amount. The two cases were consolidated for hear-  
ing and there was a finding and judgment in plaintiff's favor  
for \$600.53, to reverse which the defendant prosecutes this  
appeal.

It appears from the evidence that plaintiff, who was  
in the bakery business, was also selling the Meek Reel Gas Oven  
and other bakery equipment; that on October 25, 1919, a written  
contract was entered into between the parties for the sale and  
purchase of a Meek oven and other equipment for \$3925.00, \$1000.00  
in cash, \$2500.00 on sight draft with bill of lading, and "the  
balance when the equipment is delivered and in running order.  
Everything to be finished in a workmanlike manner and delivered  
on or before 30 days from the date of this contract, barring





strikes and delays on railroads." The price was f.o.b. factory." The evidence further tends to show that the oven was delivered on November 15, some of the other equipment on November 18, some on the 20th and the balance about December 3, 1919. Upon receipt of the equipment the defendant notified the plaintiff and the latter went to the defendant's place of business and the matter of installation was discussed. The defendant hired two men who installed the equipment but it appears never to have worked satisfactorily.

One item mentioned in the written contract was "Proof Box", and the defendant's position was that before entering into the contract he called on the plaintiff who took him around to show him some bakery equipment, which included a metal proof box and which the plaintiff said he would include in the contract. On the trial the defendant offered evidence to this effect, and further evidence that the proof box delivered was made of wood instead of metal, and it was his contention that it was not as valuable as a metal proof box. The court excluded most of this evidence apparently on the ground that the defendant waived the question of the material of the box by accepting it. We think this was error. Sec. 49, Ch. 121a, R.S., provides that in the absence of an express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages, or other legal remedy, for breach of any promise or warranty in the contract to sell or the sale, provided after acceptance the buyer notifies the seller within a reasonable time of the breach of any promise or warranty. In the instant case the defendant testified that he complained at once that the proof box was of wood instead of metal. The evidence offered was competent and did not tend to vary the

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terms of the written contract, but to explain it.

The defendant further contends that there was an implied warranty in the contract to the effect that the merchandise was reasonably fit for the purposes for which it was purchased. There would be no implied warranty under the law in regard to the Meek even because paragraph 4, sec. 15 of the Uniform Sales Act provides: "In case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose." But there is an express provision that everything sold was to be "finished in a workmanlike manner" and evidence was offered on behalf of the defendant tending to show that some of the equipment was not finished in a workmanlike manner; that certain of the wheels were bent and out of alignment, the shelves crooked and that the spindles did not match. The court excluded most of this evidence and in this we think there was error. Nor do we think it would require the testimony of an expert in this respect, because it is apparent that practically anyone could observe that the workmanship was not good if it was as the evidence offered tended to show.

There also seems to be a contention that the reason the bakery equipment was not satisfactory after it had been installed was caused by the fact that the installation was done by men unfamiliar with that kind of work. The evidence in the record is such that we would not be warranted in holding that the oven could only be installed by men expert in that line. It might be entirely feasible for men of ordinary intelligence to do the work, and again it might appear that such men could not properly do the work, but in the state of the record before us, we think it cannot be said that the work might not have been







done properly by men who were not considered experts in that line.

The defendant also contends that under the terms of the contract it was the duty of the plaintiff to install the equipment and to put it in running order before he was entitled to be paid. We do not so construe the contract. And we are of the opinion that on the record before us it was the duty of the defendant to install the equipment, and the provision of the contract which provides for the payment of the \$425.00 of the purchase price after the equipment was installed fixes the time for the payment of the balance. By the contract \$1000.00 was paid in cash and \$2500.00 to be paid upon a sight draft with bill of lading attached, and the balance of \$425.00 was to be paid when the machinery was installed and in running order.

We have refrained from discussing the evidence to any extent in this opinion for the reason that there must be a new trial, but upon a re-trial of the case any evidence offered by the defendant tending to show that any of the equipment was not made in a workmanlike manner should be admitted. Under the contract and the law plaintiff was required to deliver to the defendant the equipment mentioned in the contract, and if it was made and finished in a workmanlike manner when delivered, this is all that was required of the plaintiff. Of course, if the oven operated improperly on account of the faulty work of the men employed by the defendant to install it, this would not prevent a recovery.

The judgment of the Municipal Court of Chicago is reversed, and the cause is remanded.

THURSON, P. J. AND TAYLOR, J. CONCUR.

REVERSED AND REMANDED.

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RESEARCH AND ANALYSIS

Opinion filed Apr. 11, 1923.

180 - 27656

EMIL ARNSEN and JOHANNA ARNSEN,

Appellees,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

v.

JOSEPH LEO. LUMBER CO.,  
a corporation,

Appellant.

225 N.E. 646

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

Plaintiffs brought suit against the defendant to recover damages in the sum of \$200.00 claimed to have been sustained by reason of a team of horses of the defendant running away and damaging a fence belonging to the plaintiffs. There was a finding and judgment in plaintiff's favor for \$73.50, to reverse which this appeal is prosecuted.

The evidence tends to show that on April 21 1921, a team of horses belonging to the defendant was hitched to a lumber wagon and standing under a viaduct near an enclosed vacant lot, the property of plaintiffs. The bridle bits were removed from the horses' mouths and they were eating oats from nose bags. The driver who was in charge of the team seems to have been standing on the sidewalk near the wagon when suddenly the team started to run away. The driver jumped on the wagon and endeavored to stop the horses but was unable to do so because of the removal of the bridle bits from the horses' mouths. The team struck the fence around plaintiffs' lot and damaged it.

U.S. DEPARTMENT OF AGRICULTURE

8260 • J. Neurosci., September 24, 2008 • 28(39):8255–8261

7800 111111

10. *Journal of the American Medical Association*, 1977; 237: 1007-1010.

Figure 2.14

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51.01 All items on this page are subject to change without notice.

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is true of the United States, Canada, and the United Kingdom. The majority of the population of the United States is of European descent. This is true of the United States, Canada, and the United Kingdom. The majority of the population of the United States is of European descent. This is true of the United States, Canada, and the United Kingdom.



The defendant's contention is that there is no evidence tending to show any negligence on the part of the defendant, because the evidence discloses that the driver in charge of the team was in his customary place on the wagon at the time the horses ran away and he was unable to control them. A further point seems to be that there is no proof that the team and wagon belonged to the defendant. We think the position of the defendant is not warranted by the evidence. The evidence tends to show that the team was standing under railroad viaduct with feed bags on and the bits removed. There is also evidence tending to show that the driver was not on the wagon but was on the sidewalk near it. The evidence further tended to show that one of the horses was only four years old. After the team had run away the driver stated that the team and wagon belonged to the defendant company and that the latter would make good any damage. Afterwards plaintiffs called numerous times on the defendant who agreed to repair the fence, but later refused to do so.

We think the evidence was sufficient to warrant the finding that the defendant was guilty of negligence in failing to properly secure the horses, even if it be assumed that the driver was in his accustomed place, because with the bridle bits removed from the horses' mouths the driver on the seat would have no power to stop the horses should they attempt to run away. Moreover, the team was standing under a railroad viaduct, and considering all the evidence in the case, we are clearly of the opinion that the finding of the court was warranted.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.



27020  
11 - 27020

ALEXANDER BURKE SONS, etc. et al.  
Defendants in Error.

v.

CONNELLY IRON SPONGE & GOVERNOR CO.,  
et al.

Plaintiffs in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

229 I.A. 647

MR. JUSTICE TAYLOR delivered the opinion of the court.

On May 3, 1920, the complainant, Alexander Burke's Sons, dealers in and manufacturers of common brick, filed a bill of complaint in the Superior Court of Cook County to enforce a mechanic's lien upon a leasehold interest owned by the defendant, the Connelly Iron Sponge & Governor Co.

On June 17, 1920, the defendant, Connelly Iron Sponge & Governor Co. filed an answer denying liability. There was a reference to a master and on February 28, 1921, the master's report was filed finding that the complainant had a mechanic's lien for \$440.13; that one John Dilley, an intervening petitioner, was entitled to a mechanic's lien in the sum of \$85.00, and that The Haverwood Glass Co., an intervening petitioner was entitled to a mechanic's lien in the sum of \$340.84. Objections were filed to the master's report and overruled by him, but the record before us does not show that any exceptions were entered before the chancellor.

On March 3, 1921, a decree was entered by the chancellor approving and confirming the master's report.

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.



It is contended by counsel for the defendant (1) that the proof was insufficient; (2) that the Mechanic's Lien Statute was not complied with in that there is no evidence that the owner of the land authorized or knowingly permitted the alleged improvements to be made.

(1) As to the insufficiency of the evidence:- It is admitted by the defendant that it is a manufacturing corporation and the owner of a leasehold interest in 3154 South California avenue, which expires October 21, 2015, and, it is stated by counsel for the defendant, that in the month of January, 1920, it was making certain improvements on the premises as a result of a fire, and contracted with the Industrial Building Co. to make the repairs, and that that contract amounted to about \$6,000.00.

The witness Burke, for the complainant testified that about January 10, 1920, he entered into a contract on behalf of the complainant with the Industrial Building Co. for the purpose of furnishing the brick to be used in improvements on the premises covered by the leasehold above referred to; that the legal description of the property is as set forth in the bill of complaint; that the agreement was to furnish that company with brick at \$15.00 a thousand; that the brick were to be delivered as they were required and the payments to be made on the tenth of the month following the delivery; that from time to time the Industrial Building Co. requested the furnishing of brick and that the brick enumerated in certain fifteen slips of paper, which were sworn to by the witness but which are not shown in the record, were delivered "to the job" as ordered by the Industrial Building Co.; that the brick were delivered to the premises at 3154 South California avenue in the amounts and on the dates as



shown in the tickets; that the tickets in question are the original receipts which were secured by his teamsters when the deliveries were made. The record shows that the fifteen slips were duly received in evidence and marked by the master, complainant's Exhibit 2 to 16 inclusive. He further testified that there was still due to the complainants the full price of \$15.00 per thousand for all of the brick called for by these fifteen delivery tickets, and, further, that on March 27, 1919, at the office of the Connolly Iron Sponge & Governor Co. he served a notice of mechanic's lien on one F.W. Sperling, manager of that company, at 3154 South California Avenue. The record shows that document was duly received in evidence by the master and marked, complainant's Exhibit 17. He also testified that all of the brick which was called for in the tickets referred to were actually used upon and became part of the improvements on the premises in question.

There was offered in evidence, also, on behalf of the complainants, an original execution in a suit of John J. Burke against the Industrial Building Company in the sum of \$675.00 in case No. 695080, in the Municipal Court of Chicago. That document was duly received in evidence and marked by the master, complainant's Exhibit 18.

A witness, Wilmer White, testified that nothing was paid on the account to the complainant; that the Industrial Building Co. was entitled to a credit for empty cement bags to the extent of \$28.70, leaving due the complainant \$440.13.

One John Dilley testified that pursuant to a request from the Industrial Building Co., about the 1st or 2nd of February, 1920, he put in six new conductor heads and repaired certain down spouts, putting in new ones wherever it was necessary.







completing the work about April 2, 1920, that the price which was agreed upon before the work was done was \$25.00, no part of which has since been paid; that on April 29, 1920, he delivered a certain paper to the manager of the defendant company at 3154 South California avenue, and that the paper which he had at the hearing before the master was a duplicate of the document which he served. The record shows that that paper was received in evidence and marked, Dilley's Exhibit 1.

One Goldstein, president and treasurer of the Ravenswood Glass Co., testified that the Industrial Building Co. employed The Ravenswood Glass Co. to do certain work on the premises at 3154 South California avenue; that the work consisted of cleaning out old glass from steel sash and replacing it with new glass, fitting, tightening and fastening with putty; that the work was begun on January 20, 1920, and finished on February 9, 1920; that Gold, treasurer of the Industrial Building Co., told him his company would be paid within 30 days; that there still remained due from the Industrial Building Co. to The Ravenswood Glass Co. the sum of \$380.84.

One Swarts, vice president of The Ravenswood Glass Co., testified that on January 26, 1920, he served a notice of lien on Smyley, the western manager of the defendant company. That purported to be a copy of that notice was offered and received in evidence on behalf of The Ravenswood Glass Co. and marked by the master, Ravenswood's Exhibit No. 3.

The evidence of Smyley, manager of the defendant company, is to the effect that the Connally Iron Sponges & Governor Co. contracted with the Industrial Building Co. for certain repairs on their building; that the agreement was made on January 8, 1920 for \$5291.00; that the work was done and the total amount

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive group. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive group.

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There is a large number of people who are interested in the work of the Commission, and it is a pleasure to have them. The Commission is a body of experts who are working to improve the work of the Commission. The Commission is a body of experts who are working to improve the work of the Commission. The Commission is a body of experts who are working to improve the work of the Commission.

paid to the Industrial Building Co. by the defendant was \$6046.00. Gayley testified that although payment in full was made to the Industrial Building Co. it was done without requesting or receiving any sworn affidavits from the Industrial Building Co. or its officers as to the names of its subcontractors and the amounts due and to become due them.

Gayley, manager of the Connelly Iron Sponge & Governor Co., when called on behalf of that company, testified that he alone was authorized to purchase material and labor; that he was manager in January 1920; that he paid the Industrial Building Co. \$6,000.00, or more, for the work; that no notice of lien was ever served upon him or the defendant prior to the last payment; that he did not know of any interest or indebtedness due any of the intervenors prior to the service of the lien notices but had some telephone conversation with some of the parties that they were going to place liens after the final payment; that the Industrial Building Co. is now bankrupt.

It is contended on behalf of the defendant, Connelly Iron Sponge and Governor Co., that the evidence does not sufficiently prove that the materials and labor as set forth above were furnished. We do not think that contention tenable. The evidence shows the making of each subcontract and also the delivery of the materials and the doing of the work and the non-payment of the price therefor.

There were offered and received in evidence various delivery receipts and certain subcontractors' notices of mechanics liens and other documents. That they show in full we do not know inasmuch as they are not made part of the record. The decree recites that the master's report "together with







the exhibits and evidence taken upon said reference, was on February 28, 1921, filed in this court" etc. It also shows the approval of his report. The defendant having failed to bring to this court a complete record of the exhibits it follows that we have not before us all the evidence and under these circumstances would not be entitled to say that the decree of the chancellor was not justified. Notwithstanding that, however, it is our opinion that the evidence that is actually in the record is sufficient to make out a prima facie case and support the decree that was entered.

As to the contention that certain testimony of certain witnesses was incompetent. The record shows that no objection was made at the time or at the hearing when the testimony was given, but that at an intermediate and subsequent hearing before the master and after the close of the testimony of Burke and Willey and White, and after the cross-examination of Amley, counsel for the defendant made a motion before the master to strike out the evidence of Burke, Willey and White taken at a prior hearing on December 8, 1920, on the ground that it was incompetent, immaterial and irrelevant, and on the ground that Burke had no personal knowledge as to the delivery of any of the material; which motion the master overruled. What the master did was perfectly proper inasmuch as the objections to the testimony should have been taken at the time the evidence was being given. Further, the evidence was entirely proper just as it was given and elicited, even though some of it might be considered as hearsay. A prima facie case may be made out even though part of the evidence is obviously a matter of opinion or a matter of hearsay if there is no cross examination no objection and no evidence in contradiction. Then,



too, as we have already said, all the evidence is not before us and we must, therefore, assume that what was presented to the chancellor was sufficient to justify the decree.

(2) It is contended that there is no evidence in the record that the owner of the land "authorized or knowingly permitted" the alleged improvements to be made. Section 1, of the Mechanic's Lien Act contains the following: "This lien shall extend to an estate in fee for life, for years, or any other estate or any right of redemption or other interest which such owner may have in the lot or tract of land at the time of making such contract or may subsequently acquire therein" etc. In Sork v. Crandall, 233 Ill. 79, page 84, the court said that the words "The owner" as they were used in the act "means the owner of any interest in the land." From that it follows that the lease-hold interest of the defendant, Connolly Iron Sponge & Governor Co., described in the bill of complaint was properly subject to the liens that are herein claimed. It was not necessary that the owner of the fee should either permit the work to be done or the materials to be furnished or have any knowledge thereof. Inasmuch, therefore, as the defendant failed to receive or demand, pursuant to Section 3 of the Mechanic's Lien Law, the names of the parties furnishing materials and labor and the amounts due or to become due to each, it is liable even though it did pay the general contractor in full.

Finding no error in the record the decree is affirmed.

AFFIRMED.

THOMSON, F.J. AND O'CONNOR, J. CONCUR.





Opinion filed April 17, 1923.

ALFRED ANDERSON and EMIL ANDERSON,

Plaintiffs in Error,

v.

J. M. CARSON,

Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On April 21, 1921, the plaintiffs obtained judgment by confession in the sum of \$135.00 on a written lease. The judgment was for \$115.00 for rent for the month of March, 1921, and \$20.00, attorney's fees. On April 25, 1921, that judgment was vacated and defendant given leave to make a defense. On June 28, 1921, there was a trial before the court without a jury and judgment entered for the plaintiffs in the sum of \$12.00. That judgment is now before us upon a writ of error.

There was offered in evidence a written lease running from November 1, 1918 to September 30, 1921. The defendant occupied the premises, an apartment, under that lease, until March 20, 1921, when he moved out. He paid the rent which was provided for in the lease, at the rate of \$115.00 per month, through February, 1921. On October 30, 1920, the defendant was notified by August West, the lessor, that his tenancy of the premises would be terminated thirty days thereafter.

Carson, the defendant, testified that immediately after receiving the notice he went over to Hour's office - the agent of the owner - and that Hour told him the owner instructed



THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION

The Journal of the American Medical Association is published weekly, except on Sundays and public holidays, at the office of the publisher, 535 North Dearborn Street, Chicago, Ill. The subscription price for the year in advance is \$5.00 in advance, \$6.00 in arrears. Single copies are sold at 15 cents. The subscription price for the year in advance is \$5.00 in advance, \$6.00 in arrears. Single copies are sold at 15 cents. The subscription price for the year in advance is \$5.00 in advance, \$6.00 in arrears. Single copies are sold at 15 cents.

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him to raise the rent to \$185.00, and that they would not comply with the clause 16 until the defendant entered into a new lease. Clause 16 is as follows: "It is hereby understood that the necessary decorating is to be done at the expiration of the 2nd year of this lease." Carson also testified that Bour told him that he was sorry he had to serve the thirty days notice but that if he, Carson, stayed in the premises and only paid the regular rent he, Bour, would lose West, the owner, as a client. Further, that Bour said he thought he, Carson, should at least, stand part of the difference between the \$115.00 and \$185.00.

On the other hand Bour testified that he had a conversation with the defendant after the thirty day notice was served in which he told Carson that West, the owner, was trying to hold him, Bour, for the difference in rent, and that he, Bour, then said to Carson, "I want to know if you couldn't do something?" That Carson then said, "Well I will have to think it over." About two weeks afterwards, he says, he called Carson up and asked him what he had decided to do about the difference in the rent and Carson said his lawyer told him his lease was as good as gold. On November 26, 1920, Bour, the agent, wrote to the defendant the following: "Your letter received in regard to decorating. You were notified some days ago that your lease on Apartment One in building located at 6737 Oglesby avenue was void, and there will be no decorating done until a new lease is entered into.

On March 30, 1921, the defendant mailed a check for \$15.00 to Bour, the agent of the owner. Prior to that, however, Carson testified that he had a conversation in which he asked that the plaintiff allow him a month's rent or allow





him to sublease the premises; that Bour told him he could sublease it at \$200.00 a month or that they would try to rent it. Carson further testified that he was not able to sublease it for \$200.00 a month, and, also, that they would not put up a "For Rent" sign. He, also, testified that "they told me they would allow me \$100.00 or one month's rent."

The defendant moved out on March 30, 1921. On April 15, 1921, one Grant, purporting to represent the owner of the building notified the defendant by letter, that he was in arrears in the sum of \$230.00 and that unless it was paid by Thursday of that week judgment would be confessed on the lease. In that letter the check for \$15.00 was returned.

Bour, the agent, testified that in February, 1921, he met the defendant and the latter asked him what he would give him for his lease and he told him he had a chance to get a house on the northwest side; that he, Bour, told him that he would try and rent the apartment for him; that some time afterwards the defendant asked him why he did not put up a sign in the apartment and that Bour said all right and a sign was put up. On the subject of decorating, Bour testified that he told Carson he would send the decorator over and see what was wanted but that Carson said it would be better not to do that and gave as a reason that if it was not rented until the first of May he, Carson, would stay in until October 1st.

It will be seen, therefore, that the controversy resolves itself chiefly into a matter of credibility. If what the defendant testified to is true, and the agent of the plaintiff told him that they would allow him \$100.00 or one month's rent, and the defendant accepted that proposition and mailed them a check for \$15.00, or the difference, for the rent of

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1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This movement is caused by a number of factors, including the search for better living conditions, the desire for education and employment opportunities, and the attraction of urban areas by the concentration of industry and commerce. The result of this process is that the majority of the population now lives in urban areas, which are characterized by a high density of people and a high level of economic activity. This has led to the development of a new type of urban area, the metropolitan area, which is a large area of land surrounding a central city. The metropolitan area is characterized by a high density of people and a high level of economic activity, and it is the center of a large region. The process of urbanization has led to the development of a new type of urban area, the metropolitan area, which is a large area of land surrounding a central city. The metropolitan area is characterized by a high density of people and a high level of economic activity, and it is the center of a large region.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

March, 1921, and moved out, then the judgment that was entered was proper. The testimony of the defendant is contradicted by Bour, but evidently the trial judge believed the story told by the defendant. The evidence on the part of the plaintiff, bearing in mind particularly the notice of October 30, 1920, and the letter of November 26, 1920, suggests very strongly that the owner was anxious to get the defendant out of the premises. The notice of October 30, 1920, notified the defendant that his lease would be terminated in thirty days and that he should give up the premises by the end of November, and the letter of November 26, 1920, notified him his lease was void.

Under the circumstances, we do not feel that we are justified in holding that the trial judge erred in deciding that there was an agreement that the defendant should receive a credit of \$100.00 on the rent for March, 1921. There is evidence that the owner through his agent, Bour, refused, after the lease had run two years, to do the necessary decorating. The lease provided, "It is hereby understood that the necessary decorating is to be done at the expiration of the 2nd year of this lease." The second year expired on November 26, 1921 and Bour wrote "there will be no decorating done until a new lease is entered into."; intimating very definitely that the original lease was at an end and that no decorating under it would be done. It follows, therefore, that it is quite reasonable that the agreement, testified to by the defendant, that he should be allowed a credit of \$100.00, was made. The trial judge evidently believed that the evidence sufficiently proved that such an agreement was made, and we are of the opinion that his judgment should stand.

Considerable argument is made concerning the retention





by the plaintiff of a \$15.00 check which was sent by the defendant on March 30, 1921, and which was returned to the latter on April 15, 1921. The check was retained, without explanation apparently, for fifteen days, and was then returned. In our judgment it cannot reasonably be said that holding it for that time before returning it was such conduct as would justify us in concluding that the plaintiff was estopped and bound as by an accord and satisfaction.

As to the contention on behalf of the plaintiff that Bear in his dealings with the defendant had no authority to bind his principal, we think the evidence amply shows that West, the principal, was bound by all the conduct of Bear in his dealings with the defendant.

The trial judge entered judgment for \$12.00 in favor of the plaintiff. He apparently arrived at that amount by deducting a credit of \$100.00 and \$3.00 costs from the month's rent of \$115.00. The judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. CONCURS.  
THOMSON, P.J. DISSENTING:

I am unable to concur in the foregoing decision. The lease in question was executed by the defendant Carson and the original landlord, West, in October, 1918, for a term expiring September 30, 1921. West sold the premises <sup>around</sup> March 1, 1921, to the plaintiffs, Alfred and Emil Anderson, and the Carson lease was then assigned to them. Apparently in October or November, 1920, West tried to terminate the lease and he caused a notice of termination to be served on Carson. Carson was advised that the lease was perfectly good and could not be cancelled, and he so notified the agents for West. The lease provided that at

by the possibility of a further report which was made by the telephone  
 but on August 27, 1941, and which was reported to the police on  
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REMARKS:

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 as to the telephone. The telephone was at 11:15 AM.

the end of two years, which would be in the fall of 1920, the "necessary decorating" was to be done, presumably by the landlord. Apparently, Carson communicated with the agents about this decorating in November, 1920, and under date of the 20th of that month the agents acknowledged receipt of that communication and again advised the tenant Carson, that he had already been notified that his lease was void and that there would be no decorating until a new lease was entered into. Nothing further was heard from the tenant, and a few weeks later the agent called him up to see what he intended to do, and he then told the agents that he had been advised his lease was good, and, in effect, that he proposed staying where he was. Carson did continue to stay in the premises in question and paid his rent each month until March. He moved out on the 20th of that month and on the 30th sent a check to the agent for \$15.00, claiming that he had been given an allowance of \$100.00 on a month's rent. This check was returned to the defendant under date of April 15, in a letter from the attorney for the new owners, and the tenant was then advised that he was in arrears in his rent to the extent of two months, and that unless he paid this rent a judgment would be taken on the lease.

I concur with the majority opinion to the effect that under all the circumstances, the fact that the defendant's check was not returned sooner, cannot be held to be an acceptance on the part of the landlord, of the March rent.

The lease in question was a binding contract between Carson, the tenant, and West, the landlord. It was just as binding on the tenant in March, 1922, as it had been on the landlord in October and November, 1920. The attempt of the landlord to terminate the lease in 1920, did not affect the validity of







the lease, and both parties remained bound by the lease. The failure of the landlord to do the decorating in the fall of 1920, did not give the tenant the right to terminate the lease in the spring of 1921.

Apparently the defendant, Carson, claims that he had the right to consider the lease at an end, and move out of the premises in March, 1921, by reason of some oral agreement consummated at that time. No such oral agreement is made out by the evidence. It is not claimed that Carson ever had any talk with the new landlords, the Andersons. West testified that he had no talk with Carson. The agent, Hour, denied making an arrangement with Carson whereby he was to have \$100.00 credited on his March rent. According to the defendant's own testimony, there was no such agreement entered into as would give him the right to move out and be relieved of his obligations under the lease. While the defendant was on the stand his counsel asked him what conversation he had with Mr. Hour regarding his moving from the premises. The agents for the premises were George C. Hour & Co., apparently composed of two men by the name of Hour, one senior and the other junior. To the question just referred to, the defendant answered that he kept trying to get them to decorate and also that he had sickness in his family and could not move. He was asked if he told that to Mr. Hour or Mr. West and he answered: "Yes, Sir." He was then asked what "they" said about his staying in the property, and he said he asked "them" if "they" would allow him a month's rent or permit him to sub-let the premises and "they" said he could sub-let it or "they" would try to rent it, but that he could not sub-let it and "they" would not put a sign on the premises. He was then asked what conversation he had with Mr. Hour on this matter, prior to his sending in his check for \$12.00, and he answered:



"They told me they would allow me a hundred dollars or one month's rent, and I mailed them the fifteen dollar check, which was the balance on that month, and moved out". Later the defendant was asked what conversation he had with Mr. Hour or Mr. West between November, 1920, and the time he moved out, with respect to his staying in the premises from month to month, and he answered: "They advised me that I was a tenant from month to month and that they would not do any decorating."

Certainly the foregoing cannot be considered as establishing an agreement between the defendant and his landlord, terminating the lease or giving the tenant an allowance of \$100.00 on a month's rent, in lieu of the decorating. There is no attempt to show by the evidence in the record that Hour & Company had any authority to bind either the old or the new landlord in the matter of either an allowance on the rent or the termination of the lease.

In my opinion, the judgment of the Municipal Court should be reversed and the cause remanded to that court.





Opinion filed April 11, 1923.

AMERICAN COLLEGE OF PHYSICAL  
EDUCATION, a corporation.

Appellant.

v.

INTERNATIONAL HEALTH RESORT,  
a corporation.

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

229 I.A. 648

MR. JUSTICE TAYLOR delivered the opinion of

the court.

On May 13, 1921, the plaintiff, American College of Physical Education, a corporation, obtained judgment by confession in the sum of \$2511.21, upon a promissory note, against the defendant, International Health Resort, a corporation. On August 4, 1921, that judgment, upon an affidavit of one Shattuck, was opened up, and an order entered that Shattuck's affidavit should be considered as the defendant's affidavit of merits. Subsequently there was a trial before the court and a jury, and at the close of the evidence, the court instructed the jury to find the issues against the plaintiff. Accordingly, there was a verdict for the defendant, and judgment thereon in favor of the defendant. From that judgment this appeal was taken.

The evidence shows that a note dated September, 1920, in the sum of \$2500.00, payable to the plaintiff, ninety days after date, and which recites that it was given for a valuable consideration, was made out and signed "International Health Resort, M. A. Wood, Pres." and delivered to the plaintiff, and that the defendant, International Health Resort, received from the plaintiff \$2200.00 therefor, but it is claimed by the de-



Feb 10 2015

[illegible][illegible]

defendant that the plaintiff at the time was indebted to the defendant in the sum of \$35,000.00, which had never been paid; and, further, that the president had no authority to give the note to the defendant.

Inasmuch as judgment had been entered upon a cognovit and the defendant was given an opportunity to defend, there was first introduced in evidence the testimony of Percy A. Wood, called on behalf of the defendant. His evidence must be taken, therefore, as true, save where it is challenged or contradicted by other credible evidence.

His evidence shows the following:- The plaintiff and defendant were Illinois corporations. There was, also, another, the National College of Drugless Physicians. Bernard Macfadden was, up to the time in question, practically, the sole owner of all three. Wood was employed by Macfadden and had been in charge of all three corporations for about ten years. Wood was president of both corporations, plaintiff and defendant, down to October, 1920. His wife, Susie H. Wood, was at the same time, secretary of both corporations. During all the time he was president of the two corporations down to October, 1920, he executed notes in behalf of each of the corporations, for various debts which might be incurred by them. He made them as president. There never was a resolution authorizing the president to execute notes except upon the request of a lender.

In August, 1920, the indebtedness of the plaintiff to the defendant was \$35,417.62, to the College of Drugless Physicians \$19,409.86, and on an account called the Reese Account, \$30,917.46.





According to the evidence of Blanche Haines, who became on October 1, 1920, bookkeeper and secretary of the defendant, and who prior to that time had kept the books of all three corporations, the offices of all of them were at 4200 Grand Boulevard, Chicago, and after October 1, 1920, at Battle Creek, Michigan. It is admitted that the books show the above mentioned indebtedness of approximately \$35,000.00 to the defendant by the plaintiff, and, also, show the new transaction, the one here in question, whereby \$2500.00 was loaned by the plaintiff to the defendant. One Shattuck was called by the defendant and stated that he owned one share of the stock of the defendant, and has been a director of that company since January, 1921, and that he knew nothing about the transaction in question except what has occurred since January, 1921. On cross-examination he admitted that he made the affidavit used to open up the judgment by confession, although he knew nothing about the facts therein set forth save as he was told by Bernard Macfadden. Macfadden did not testify, although Shattuck said he was in town on the Monday previous to the day he, Shattuck, testified. Shattuck further testified that at the time he executed his affidavit he did not know that the attorney for the defendant had in his possession letters which the defendant had sent to him, which showed the facts stated in his affidavit were not true. There was offered in evidence a contract in writing, dated August 7, <sup>1920</sup>~~1918~~, and which was signed by Bernard Macfadden and Corey A. and Essie Haines Wood. That contract, which was in force until September 13, 1920, when another contract was entered into, brought about a sale to Corey A. and Essie Haines Wood, of a one-fourth interest in all the property and business of the Bernard Macfadden Reformatorium. The Macfadden College



of Physculptethy and the American College of Physical Education for \$37,500.00, and provided that that amount should be paid for by taking twenty-five per cent out of the profits of those businesses as they might, from time to time, accrue.

Two letters, one dated September 9, 1920, by M. A. Wood to Macfadden, and one dated September 18, 1920, by Macfadden to M. A. Wood, were proffered on behalf of the plaintiff, but were objected to and refused admission by the trial judge. They should have been admitted as they were, on their face, evidence of a binding contract made between Wood and Macfadden concerning matters very material to the present controversy. By that contract all the debts of the plaintiff to the other three corporations, including the Reese account, were to be cancelled; and the defendant leased certain premises to the plaintiff for a certain annual rent, and M. A. Wood promised to put in escrow \$2250.00, the equivalent of a half year's rent, as a guaranty of good faith. Further, Macfadden in his letter suggested that the plaintiff loan the defendant "any idle money that they may have on hand," etc. The evidence shows that Wood did, subsequently, put in escrow with the Merchant's Loan and Trust Company, the sum of \$2250.00.

There was offered and received in evidence, however, a contract, dated September 18, 1920, which was signed by Macfadden and M. A. and Mrs. E. H. Wood. It recited that it was not only between, but by the three corporations as parties of the third part. It was, also, signed as follows: "The American College of Physical Education by M. A. Wood, its President. E. H. Wood, its Secretary. The International Health Resort, by Bernard Macfadden, its President, Blanche Reese, its Secretary.







International College of Drugless Physicians, by Bernard Macfadden, its President, J. L. Haily, its Secretary." After reciting by way of preamble that Macfadden owns a majority of the stock of each of the corporations and is or will be a director of each, and is largely interested in them financially, and that E. A. and S. H. Wood, also, owned stock in the same corporations and are financially interested in them and that E. A. Wood had been an officer in each of them, it sets forth in eight articles certain new contractual relations.

Article one provides that Macfadden is to take over and become the owner of the defendant company and the College of Drugless Physicians; that E. A. Wood is to take over and become the owner of the plaintiff corporation; that Macfadden sells, transfers and turns over to Wood all his stock in the plaintiff company; and that Wood shall take possession, control and supervision of all the interest Macfadden had in that company; that the two Woods turn over and transfer to Macfadden all the stock owned by them in the defendant company and the College of Drugless Physicians, together with all their interest therein; that as the parties own a majority of the stock and the two Woods constitute a majority of the board of directors of each corporation, they will, as it may become necessary to have the terms of the contract ratified, do all those things necessary for corporate approval and ratification.

Article two provides for the cancellation of all the debt of the plaintiff to the defendant; all of the debt of the plaintiff to the College of Drugless Physicians, and that the Hesse account be transferred to and assumed by the defendant company.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a genuine organization or a front organization for the purpose of subverting the Government of the United States.

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CHICAGO, ILL. 60637  
1968

1. The following information was obtained from the records of the  
2. Bureau of the Census, Department of Commerce, Bureau of Economic  
3. Analysis, Office of Statistics, Washington, D. C., and is  
4. being furnished to you for your information. It is not to be  
5. distributed outside your agency.

Article three provides that the real property, 4200 - 4208 and 4212 Grand Boulevard, Chicago, occupied by the plaintiff, shall be leased by the defendant to the plaintiff for five years for a total rental of \$37,000.00, payable in certain monthly installments, and the defendant shall pay the taxes, insurance and keep the premises in repair.

Article four provides that Wood shall place in escrow \$2250.00 as security for the payment of the rent.

Article five provides that the plaintiff "will loan to the International Health Resort any idle money that it may have on hand which amounts are to be due at such times as the money will be required by the College."

Article six provides for procuring for Wood the one share of stock owned by one Shattuck.

Article seven provides that this agreement puts an end to all former contracts and agreements between Woodfadden and the two Woods.

Article eight provides that the lease shall be executed by the plaintiff and defendant in their corporate capacities and spread upon their records.

The foregoing contract, although dated in the preamble as of September 18, 1920, was actually signed on October 2, 1920, while the note herein sued upon is dated September 22, 1920.

It is contended by the defendant that even if the contract of October 2, 1920, "be considered as valid, it could not furnish a consideration for the note in question, as the note was made at least ten days prior to the date on which the contract was

Article 10 provides that the Board of Directors, composed of five members, shall be elected by the shareholders at the annual meeting in-  
for a period of one year, and the Board shall have the power, subject to the  
approval of the shareholders, to elect or re-elect any member of the Board.

Article 11 provides that the Board of Directors shall have the power to elect or re-elect any member of the Board.

Article 12 provides that the Board of Directors shall have the power to elect or re-elect any member of the Board.

Article 13 provides that the Board of Directors shall have the power to elect or re-elect any member of the Board.

Article 14 provides that the Board of Directors shall have the power to elect or re-elect any member of the Board.

Article 15 provides that the Board of Directors shall have the power to elect or re-elect any member of the Board.

Article 16 provides that the Board of Directors shall have the power to elect or re-elect any member of the Board.

Article 17 provides that the Board of Directors shall have the power to elect or re-elect any member of the Board.



made at least ten days prior to the date on which the contract was entered into."

As the record stand there is some force in that argument. Unfortunately, in our judgment, the trial judge refused to admit in evidence the two letters of September 9 and 13, 1920, which taken together constitute a binding contract, and, as of the latter date, constitute, joining to <sup>them</sup> ~~the~~ the contract of October 2, 1920, a cancellation of all the indebtedness of the plaintiff to the defendant. In other words, considering the two letters and the contract of October 2, 1920, the note of September 22, 1920, must be considered as being given when the debt of the plaintiff to the defendant did not exist.

In our judgment the contract of October 2, 1920 - being signed by a majority of the directors of each corporation and being signed by the two Woods and Macfadden, and bearing in mind the history of the two corporations, and, also, the fact that the plaintiff put in escrow the sum of \$2250.00 - <sup>became</sup> ~~became~~ a binding contract; but as, by itself, without reference to the two letters, which were erroneously excluded, it came into being after the note sued upon, and in no way refers to the existence of the latter, we are not entitled on this record to enter a judgment for the plaintiff, and, we must reverse the judgment that was entered and remand the cause for a new trial.

Much of the evidence that was offered on behalf of the plaintiff and was ruled out, should have been admitted.

The defense being want of consideration and lack of authority, while admitting the execution of the note and receipt of the \$2500.00, it was highly proper for the plaintiff to show in de-

which is found in the same place as the other two specimens  
was named "A."

In the present paper I have given a brief description  
of the specimens, and the following, in the same order as they  
are given in the paper, is a list of the specimens, and the  
names of the persons to whom they were given. It is to be  
understood that the specimens are given in the order in which  
they were received, and not in the order in which they were  
given. The names of the persons to whom they were given are  
given in the order in which they were given, and not in the  
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they were received, and not in the order in which they were  
given. The names of the persons to whom they were given are  
given in the order in which they were given, and not in the  
order in which they were received.

tell the history of the various corporations and the conduct of these, particularly Macfadden, who seemed to run and own them substantially as his own private property.

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, F.J. AND O'CONNOR, J. CONCUR.

To answer the question of the origin of the word "Gospel", we must go back to the Greek word "euangelion", which means "good news" or "glad tidings". This word is used in the Bible to refer to the message of the Christian faith.

The word "Gospel" is derived from the Greek word "euangelion", which is a compound of "eu" (good) and "angelion" (news or message).

The word "Gospel" is used in the Bible to refer to the message of the Christian faith.

The word "Gospel" is used in the Bible to refer to the message of the Christian faith.



Opinion filed Apr. 11, 1923.

92 - 27566

W. O. WRIGHT and L. H. NEWFIELD,  
as WRIGHT and NEWFIELD,

Appellees,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

v.

C. O. MORGAN,

Appellant.)

229 I.A. 347+

MR. JUSTICE TAYLOR delivered the opinion of the court.

On July 15, 1921, the plaintiffs, Wright and Newfield, brought suit in the Municipal Court against the defendant, C. O. Morgan, for \$1500.00 for real estate commissions. In a trial without a jury a judgment was obtained in that amount against the defendant and this appeal is therefrom. No evidence was introduced by the defendant.

On February 7, 1921, C. O. Morgan, the defendant, signed and sealed an "Exclusive Sales Agency Contract" giving the plaintiffs, Wright and Newfield, an exclusive agency to sell certain property. The contract provided as follows:

"In consideration of you listing this property within 8 days from date with the other members of the Beloit Real Estate Board, I hereby give you for six months from this date the exclusive agency to sell my property described as follows:

The farm known as the Richard H. Harvey consisting of 513 acres in Winnebago County, Ill. and bal in Rock County, Wis. for the price of \$50,000 Dollars (\$50,000), and I agree to pay you the established commission on the sale price as provided for on the back of this card if the property is sold by you, by me or by anyone else during the continuance of this agency for the price and upon the terms herein named or for any other price or upon any other terms which I may accept.

I will sell this property upon the following terms.

Any deal acceptable to the owner.

DATE: 11 JUL 1978

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*[Faint, illegible text]*

0.1

1. *Chlorophyll a* and *Chlorophyll b* contents were determined by the method of Lichtenthaler and Whistler (1973).

and the results are given in Table 1.

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et al. reported that the frequency of use of a specific drug is an

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remitted to William Hamilton Hill. [Signature] dated Jan

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2000

I agree to execute and deliver to any purchaser you may name, a Warranty Deed of this property and to furnish said purchaser a complete abstract of title showing a good merchantable title in me at the time of transfer to said purchaser.

I hereby authorize you to bind me by contract to sell according to terms herein named."

On the back of the document containing the contract there appears the following: "Schedule of commissions adopted by the Beloit Real Estate Board effective on and after May 9, 1919". And, further, "The commission on sale and exchanges of farms in Rock County shall be 3%. The commission on sale and exchange of farms outside of Rock and Winnebago Counties shall be 3%.

There was offered in evidence a letter dated, Beloit, Wisconsin, February 7, 1921, signed by C. C. Horgen, and addressed to Wright and Newfield, containing the following: "The following list of personal property is the one referred to in the Exclusive Sales Agency Contract given you this day, to be included in price named in said contract of which this list is a part." Then follows a list of personal property such as horses, wagons, harness, oats, corn, etc. And in the same document (which was in the form of a formal card) the plaintiffs, Wright and Newfield, listed the property with the members of the Real Estate Board at Beloit.

Newfield testified that, "We make out a card for each and every individual member of the Board, and we take them to the Board meeting once a week on the day of the meeting, and at the Board meeting they put a pile of each listing, and one is given to every member present, and those that are not there at the meeting, either they come in during the week, or if they come to the next meeting, their listing cards are handed to them." He further testified, "In this case we made out a card for each and every member of the Beloit Real Estate Board and took them

[illegible]

On the first of the second week of the month of  
February 1941, the following information was received  
from the United States Coast Guard at New York  
City, New York, regarding the ship "S.S. S. S. S."  
which was reported to have been sighted on the  
coast of the United States on the 1st of February  
1941. The ship was reported to be a small  
vessel and was carrying a large quantity of  
oil. The ship was reported to be in the  
vicinity of the coast of the United States  
on the 1st of February 1941.

There was nothing in evidence to suggest that the defendant was involved in the commission of the crime.

[illegible]



to the Beloit Real Estate Board meeting, where they were distributed in piles for each member." And, further, that he delivered them to the Board.

It is contended on behalf of the defendant, (1) that the so-called "farm contract" was merely an offer which required, on the part of the plaintiffs, in order that there might be an acceptance, that the property should be listed within eight days with the other members of the Beloit Real Estate Board. (2) That the plaintiffs did not obtain an exclusive agency but merely the right, if the property should be sold within six months, to a commission of 3% on the price it actually sold for.

(1) As to the listing of the property:- The important words in the written proposition made by the defendant are as follows: "In consideration of your listing this property within eight days from date with the other members of the Beloit Real Estate Board, I hereby give you for six months from this date the exclusive agency to sell my property described as follows" etc.

The witness Newfield testified that on February 8, 1921, he listed the property with the Beloit Real Estate Board and afterwards advertised the property in the newspapers. Further, he testified, "I also sent typewritten copies of the description of the farm and a full list of the personal stock to other brokers in other cities whom I might expect to work with to help produce a buyer for this farm. I also made trips to the farm with Mr. Wright and prospective buyers for the farm."

The witness Newfield also testified, "In this case we made out a card for each and every member of the Beloit Real Estate Board and took them to the Beloit Real Estate Board meet-

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

Page 11, line 10: "and" should be changed to "in addition."

[illegible][illegible]

The attached document contains information regarding the activities of the [redacted] in the [redacted] area. This information was obtained from a confidential source who has provided reliable information in the past. The information is being provided to you for your information only and should not be disseminated to other personnel. The information is being provided to you for your information only and should not be disseminated to other personnel.

1. The first of these is the fact that the  
2. second of these is the fact that the  
3. third of these is the fact that the  
4. fourth of these is the fact that the  
5. fifth of these is the fact that the  
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7. seventh of these is the fact that the  
8. eighth of these is the fact that the  
9. ninth of these is the fact that the  
10. tenth of these is the fact that the

ing, where they were distributed, in piles for each member. That is the way it is always done."

The plaintiff, Wright, testified that the farm in question was about ten miles west of Beloit, near which he had previously owned a farm; that the defendant wanted him, Wright, to sell the farm or get him a trade; that, together, they went out and looked at the farm; that they went back to the plaintiff's office and the defendant signed a contract. He further testified that he exhibited it to prospective purchasers, and made thirteen trips to the farm with prospective buyers.

In our judgment the written proposition which was signed by the defendant became a binding exclusive agency for six months the moment the plaintiff listed the property with the members of the Beloit Real Estate Board. The evidence shows conclusively that that was done, and it follows, therefore, as a matter of law, that the proposition of the defendant ripened into a binding obligation.

(2) As to whether the contract provides for a commission of 3% on \$20,000.00 or on the price the property was actually sold for. The written proposition of February 7, 1921, contains the words, "I agree to pay you the established commission on the sale price \* \* \* if the property is sold by anyone" "for the price \* \* \* herein named or for any other price or upon any other terms which I may accept. The evidence shows an agreement by the defendant, Bergen, on April 5, 1921, to sell 213 acres to Genl. F. J. Odell for \$20,000.00, and, also, three deeds dated April 19, 1921, conveying a certain acreage to Genl. F. J. Odell. The only objection that was made to that evidence was made to the authenticity of the instruments and that objection, without more, was not well





taken. The question then is; the defendant himself having sold the farm for \$20,000.00 and the figure at which plaintiffs were given the authority to sell it, being \$50,000.00, are the plaintiffs entitled to three per cent on \$20,000.00 or on \$50,000.00?

The words "I agree to pay you the established commission on the sale price as provided for on the back of this card if the property is sold by you, by me or by anyone else during the continuance of this agency for the price and upon the terms herein named or for any other price or upon any other terms which I may accept." evidently contain a promise on the part of the defendant to pay the established commission of 3% on \$50,000.00, or any other price which the defendant might accept. The evidence shows that the terms which were ultimately accepted involved the price of \$20,000.00 and it follows, therefore, from that, that the plaintiff is only entitled to 3% on that sum. It certainly would be a somewhat unconscionable contract which would provide that the agent would be entitled to 3% commission on \$50,000.00 and, yet, the only service actually required of him might be the listing of the property with the members of the Beloit Real Estate Board. It is our opinion, however, that the contract, itself, fairly interpreted, means that the plaintiffs are entitled to 3% on what the property was actually sold for, that is 3% on \$20,000.00.

There is some contention that there is no competent evidence in the record by which the sale price may be determined; that the only evidence is that which is contained in the alleged contract which recites a consideration of \$50,000.00 and three deeds; that there was not sufficient proof of the execution and authenticity of these instruments.



The evidence shows, however, that the witness Odell testified that he entered into a contract to purchase from Morgen, the defendant, 513 acres known as the Harvey Farm situated ten miles west of Beloit, part of which is in Winnebago County, Illinois, and the other part in Rock County, Wisconsin. Also, the contract in question describes the property as the Harvey Farm consisting of 513 acres in Winnebago County, the balance of which is in Rock County. And, further, Odell said that it was on the 5th, 7th or 8th of April, 1921, when he entered into that contract and that the deal was consummated and that he had the deed and the other papers with him. The evidence further shows that pursuant to the suggestion of the trial judge, counsel for the plaintiffs offered in evidence, as plaintiffs' Exhibit C, the written contract of sale for \$20,000.00 which purported to be signed by the defendant and also by the witness Odell. That certainly was sufficient to prove that a sale of the farm was made by the defendant to Odell for \$20,000.00. And the statement of the witness <sup>Odell</sup> that the contract was made and consummated and that he was present in court in response to a subpoena duces tecum and produced the contract in question, was sufficient to make it properly admissible.

The judgment of the lower court, therefore, will be reversed and judgment entered here in favor of the plaintiffs and against the defendant in the sum of \$600.00.

REVERSED AND JUDGMENT ENTERED HERE.

THOMSON, P.J. AND O'BONNOR, J. CONCUR.

The following items, however, have been received:

1. A letter from the Secretary of the Board of Directors, dated 10/10/1911, in which he stated that the Board had decided to purchase the property at the price of \$100,000.00. This letter was received on 10/10/1911.

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207 - 36360

MYRTLE MILLER,  
Appellee,

vs.

S. S. KREGE COMPANY,  
a corporation,  
Appellant.

APPEAL FROM

CIRCUIT COURT OF  
COOK COUNTY.

229 I.A. 648

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$11,000 against appellant in a personal injury suit. On March 21, 1928, we reversed the judgment upon the pleadings, holding that the original declaration failed to show a cause of action, and that the amended declaration stated a new cause of action which was barred by the statute. Our judgment was reversed by the Supreme Court and the cause remanded to this court to consider and pass upon other questions raised by the assignment of errors.

Defendant owned and operated a department store in the City of Chicago. Plaintiff had gone there as a patron to make some purchases. While there on October 30, 1926, walking over the floor she fell, having slipped as she claimed, from stepping on a slippery substance upon the floor, and received her injuries therefrom.

Her declaration was predicated upon the failure of the defendant to use ordinary care to maintain its floors and aisles in a reasonably safe condition for passage thereon, and charged as the act of negligence that defendant suffered and permitted a slippery substance to be and remain upon said floor, upon which she slipped and fell as aforesaid, by reason whereof she was injured.



The principal ground urged for reversal is that the verdict was manifestly against the weight of the evidence on the question of negligence. In our previous opinion we said on this point:

"Upon a review of the evidence on a rehearing we are not prepared to say that the verdict was manifestly against the weight of the evidence, although sitting as jurors we might have found that it was not proven to our satisfaction that the substance on which plaintiff slipped came there through defendant's failure to exercise ordinary care, or that it had been there sufficiently long to put defendant on notice."

While the case has been reargued we are not convinced that we should reach a different conclusion.

Appellant has argued with much force that as plaintiff had previous trouble with her knee the description given by her of her fall was equally consistent with the theory that it was occasioned by weakness of the knee and not from stepping on anything slippery on the floor. While the evidence with regard to negligence is very close and presented two plausible theories of the accident, and the burden rested upon plaintiff to prove defendant's negligence as charged, we feel that it is a case where the jury's conclusion as to the facts should not be disturbed.

In this view of the case it would subserve no useful purpose to detail the evidence upon which each side bases its theory. In substance plaintiff's theory was that some oil was left upon the floor from the oiling it received on the previous Saturday night, she having been injured about the following Monday noon, and the theory of the defence was there was inadequate proof that any slippery substance was left on the floor and that had there been it would have been removed by one of the two sweepings made in the forenoon of that day, or its presence would have become otherwise manifest. To support its position defendant cited the cases of Kipp v. F. W. Woolworth, 134 N. Y. S. 646, and Spickernagle v. Woolworth, 236 Pa. St. 496.







While the reasoning in these cases is quite persuasive in support of defendant's position yet as every case must stand upon its own state of facts we feel, as stated in our previous decision, that, debatable as they are, they present a case that may be properly left with the decision of the jury.

Nor do we deem it necessary to detail the evidence with respect to the extent of plaintiff's injuries or whether the necessity of amputating her leg was due to the accident. There was sufficient evidence for the jury so to find.

It is urged that the verdict was excessive and that an instruction with regard to damages was erroneous. The instruction in question told the jury they might take into consideration all the facts and circumstances in evidence bearing on plaintiff's injuries, etc., specifying certain elements thereof "and also such future pain or prospective pain and suffering and loss of health and strength" as they might "believe from the evidence, if any, she has sustained or will in the future sustain by reason of such injuries." Error is claimed because there was no proof that plaintiff would suffer any future pain. While therefore reference thereto should have been omitted yet the instruction does not necessarily imply there was, and permitted recovery therefor only in the event of such proof. It is urged, too, that the words "loss of strength" are material only where there is proof of loss of earning capacity, and that there was none. While there was neither proof nor claim of loss of earning capacity, plaintiff was entitled to recover for the extent of physical injury to herself which is a recognized personal loss apart from the deprivation of earning money power and would naturally include the loss of strength which would be inferred from the loss of a leg. As the jury were in effect told to consider only such evidence as there was upon these elements of injury the only prejudicial effect of



the instruction would be to increase the damages. But if we consider the judgment as compensating her only for the loss of her leg and the pain and suffering endured we cannot say that it was excessive. Many cases are cited by appellee where a much larger verdict has been sustained for the loss of a leg.

As a test of the memory of one of defendant's witnesses who was a matron at defendant's store and claimed to have had a conversation with plaintiff right after the accident - which was several years prior to the trial - plaintiff's counsel asked her if she remembered the name of any other person that was injured at defendant's store. It is urged that this question was prejudicial. As there was no attempt to show that anybody else was hurt in the store we cannot regard mere asking the question as ground for reversal.

It appears that plaintiff, apparently from disappointment in the testimony of a witness, burst out crying while the witness was on the stand and was assisted from the court room. The court asked: "Can't you stop that?" Her counsel replied: "I don't know; she is all overwrought." Defendant's counsel asked to have a juror withdrawn. The court said he thought there was no occasion for it and overruled the motion therefor. We think there was no reversible error in the ruling. The incident would go only to the question of excessiveness of damages, which we have already passed upon.

The court denied defendant's motion to strike the testimony of the witness Devlin as to the appearance of the floor right after the accident, claiming that it was not connected with. We think there was sufficient connection to warrant the court's ruling.







It is next urged that plaintiff's first instruction was erroneous in referring the jury to the declaration. The practice has been condemned and the instruction in that respect is faulty. But we do not think the judgment should be reversed on that account. There can be no question but that the jury understood what were the essential elements of the cause of action, namely, whether there was any negligence on the part of defendant in permitting oil or some slippery substance to remain on the floor of the store which caused plaintiff to slip and fall and be injured as claimed.

There was an order for the exclusion of witnesses. One of plaintiffs, who, at the time of the entry of the order, was not expected to testify, remained in the room after it had become apparent he would be called to the witness stand. As no motion was made with respect to the matter, and no ruling of the court asked, there is no basis for alleged error that the court abused its discretion.

Being unable to say that there is reversible error in the record the judgment is affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

It is most regrettable that the Commission

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247 - 22082

KATHRYN RUTHERFORD,  
Appellee.

vs.

JOAN F. CHALKERS,  
Appellant.

APPEAL FROM  
CIRCUIT COURT OF  
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant to recover for personal injuries sustained from a fall from the rear porch of an apartment occupied by her and her husband under a lease from appellant. There was a judgment for \$30,000 in her favor, from which this appeal was taken.

The gist of the action is that appellant exercised and maintained control of the porch and negligently permitted the porch rail, which gave way and caused the fall, to become and remain in an unsafe and insecure condition. The original declaration contained two counts, one charging in effect and specifying the condition of the rail, the second count charging wanton negligence. There were three additional counts which alleged that the stairway, steps, landing, platform and railing in the rear of the building were used as a common passageway, over which defendant exercised and maintained control. Defendant pleaded the general issue and specifically denied that she owned, possessed and had control of the premises, passageway, etc., complained of.

It was not questioned at the trial that appellant owned the apartment building in question, and that appellee and her husband occupied an apartment on the first floor thereof. The apartment fronted east. Along its west wall at the

[illegible]



rear was the porch in question. It was reached from the back yard by a stairway about three feet wide which ran north, parallel to said west wall, to a landing, about three feet square, at the southwest corner of the porch. The east side of the landing was guarded by a rail about three feet long, from the north end of which ran the rail in question at right angles thereto along the south edge of the porch to said west wall, a distance of about five and one-half feet. Four inches north of where the latter rail joined the wall was the back door of appellee's apartment.

Parallel with the latter rail on the north side of the porch was the rear wall of another apartment in a wing of the building fronting north. Along the west side of the porch for about five feet beyond the landing was a partition separating the porch from the stairway to the second floor, which was approached at the northwest corner of the porch. The distance from the rail in question to the opposite north wall was about nine feet, so that the porch, excluding the landing, was about nine feet square. At the foot of the stairway to the second floor was the rear door of the other apartment referred to, and still further west an entrance to a third apartment. The rear entrances, therefore, to the latter two apartments, as well as the apartments on the floors above, were reached by passing along the westerly side of the porch in question from the landing, and unquestionably that part of the porch constituted a common passageway. To reach these apartments, however, there was apparently no occasion to turn to the right after reaching the landing or to pass along by the rail in question.

Because of this latter fact it is contended by appellant that the rail in question and the platform immediately in front of it did not constitute part of the passageway used

from the level in question. It was reached from the back  
 road by a railway about three feet wide which was made, per-  
 haps by a single rail, to a building, about three feet high,  
 at the western corner of the house. The west side of the house  
 was reached by a rail about three feet high, from the main  
 road at which the wall in question at right angles stands  
 along the south side of the house to the west wall, a distance  
 of about five and one-half feet. Four inches north of where the  
 latter wall joined the wall was the back door of the house.

continued.

Continued with the latter wall at the north side of the  
 house was the east wall of another apartment in a line of the  
 building extending north. Along the east side of the house for  
 about five feet beyond the building was a partition separating  
 the porch from the alleyway to the street which was  
 constructed at the northern corner of the house. The distance  
 from the wall in question to the partition house wall was about  
 nine feet, as was the porch, including the building, was about  
 nine feet square. On the west of the porch at the corner of the house  
 there was the west end of the other apartment referred to, and  
 this further west on a distance of a third apartment. The rear  
 entrance, therefore, to the latter two apartments, as well as  
 the apartments on the third floor, were reached by passing along  
 the western side of the house in question from the building,  
 and consequently back part of the porch constituted a narrow  
 passageway. To reach these apartments, however, there was  
 apparently no necessity to walk to the third floor building the  
 building as it was along the wall in question.

Continued with the latter wall at the north side of the  
 house was the wall in question and the distance between  
 the wall at the north side of the house and the building was

in common by the other tenants. There was no direct evidence on this subject, or of exercise of control by the landlord, other than what might be inferred from the character of the structure and its adaptation to the common needs of the tenants of the building, except - if it may be so regarded - that the garbage pails of the respective tenants on that floor were sometimes placed on the easterly side of said porch, and the entire porch was swept by the janitor of the building. Whether the janitor's service in this respect was pursuant to contract with the landlord or tenants does not definitely appear. He said, however, it was one of his duties as janitor of the building to sweep the porch and that he was working for the owner of the building. Nor was there any proof of the terms of the lease under which appellee and her husband occupied the apartment, and hence nothing to determine whether or not there was any special provision therein with respect to the porch or for repairing the same.

While perhaps it may be said that there was prima facie proof that appellant exercised control of the porch, and that the sufficiency of proof that the porch along the railing in question was part of the common passageway is doubtful, yet in view of error which necessitates a new trial of the case, at which there will probably be more evidence on these questions, a definite expression of our views on these points is unnecessary. They were questions of fact for the jury and we are not prepared to say that there was not some evidence to sustain the averments of the declaration with respect thereto, meager though it be. No authorities are cited to us which we deem conclusive on this state of the record.

It is next urged that the evidence does not show that appellee was in the exercise of ordinary care. It shows that







while she was standing near the rail in question it gave way and precipitated her about eight and one-half feet to the floor of the basement area underneath the porch. Neither plaintiff nor her only witness to the accident gave an intelligible account of how it happened. Her answers, when cross examined as to how the accident happened, were evasive, argumentative and unsatisfactory. The proof adduced in her behalf as to the condition of the porch rail was to the effect that it was shaky, rotten and that the nails fastening it were rusted and loose, and that these conditions were plainly perceptible. While appellee denied that her attention had been called to them she admitted having gone out on the porch some three or four times a week and more than three or four hundred times during her tenancy, and while the jury were asked to believe the testimony of her witnesses that the shaky and rotten condition of the railing was perceptible to others, they were also asked to accept her testimony that she never observed it. While her testimony was very evasive on the subject and irresponsive to the questions put to her with respect thereto she disclaimed having leaned or pressed against, or even having touched the railing in any way except to place a light mat thereon. The inference she would convey from her testimony is that the mere weight of the mat caused the rail to give way, but she was unable to explain why, without in any way touching it, she fell over with it. If such was the fact, however, the only plausible inference is that she was frightened and lost her balance, which, perhaps, is not inconsistent with her exercise of ordinary care. As, however, her opportunities for observing the condition of the railing were as good as those of her witnesses, and she sometimes tied her deer to it, it is difficult to believe that she did not know its condition.

It is also urged that the verdict for \$20,000 was so excessive and against the weight of the evidence that the jury

while she was standing near the wall in position to have her  
 and positioned her about eight and nine-half feet to the floor  
 of the room and was looking at the door. She was standing  
 not but only looking at the door and was looking at the door  
 at how it happened. But she was, when she was standing at the door  
 the room was dark, with some light, and she was looking at the door  
 the door was in the room and she was looking at the door and  
 that she was looking at the door and was looking at the door and  
 conditions were dark and she was looking at the door and was  
 that her attention had been called to them and she was looking  
 gone out on the porch some time or less than a week and more  
 that she was looking at the door and was looking at the door and  
 the door was in the room and she was looking at the door and  
 that the door was in the room and she was looking at the door and  
 to others, they were also asked to come out and look at the  
 never showed it. This was because they were in the room  
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 because, which is not necessary to be in the room and she was  
 of evidence. But, however, she was looking at the door and  
 the condition of the door was in the room and she was looking at the door  
 because, and the door was in the room and she was looking at the door  
 to believe that she was looking at the door and she was looking at the door  
 it is also known that she was looking at the door and she was looking at the door  
 because she was looking at the door and she was looking at the door

were animated by passion and prejudice. Her physical injuries were described as a fracture of the olecranon process of the left elbow, fracture of the metatarsal or long bone of the little toe of the left foot, and injury to the metacarpal bone in the left hand. Both physicians testified that they were simple fractures and the indications were that all of the bones had properly united. The foot injury disappeared in the course of two or three months, and there was a perfect union of the bones of the wrist. As to the left arm or elbow, one of her physicians testified that it was mostly a bony union. She claimed, however, that she had practically lost the use of that arm. Her attending physician, however, testified that the reason she could not use her arm was because of adhesions, and that if the arm were used and exercised it would be better, but if not moved it would become stiff from the adhesions, which could be broken by massage.

As to the fracture of the symphysis, where the bones of the pelvis unite in the back, there was also a good union. The bones were not out of alignment, the hip was not affected and the fracture did not affect the use of the knee joint or ankle joint, or any part of the leg. Appellee, however, continued to use a cane or a crutch. The cause assigned therefor by her doctor was that the sciatic nerve on that side caused pain in her leg. No vertebra of her back was hurt. While she complained of stiffness of the wrist her doctor said that there was movement in it, but a little retarded, due to adhesions therein. Appellee suffered considerable pain after the accident and claims that she is not free from it now. There is probably resultant nervousness.

She made claim in her pleadings, and attempted to in her evidence, to the loss of valuable services in consequence of the accident. Without reviewing the testimony thereon the cross examination clearly discloses that she had received very little money from such efforts, and that she unquestionably







sought to magnify their importance and value.

We are of the opinion, therefore, that the damages were excessive.

But there can be no cure by remittitur because of prejudicial error. Appellee's counsel called as her first witness appellant's janitor to make proof of the condition of the porch and stairway, and of events immediately following the accident. It soon became apparent from his examination that counsel for appellant represented an insurance company in defending the case. Under the pretext of the right to cross examine his own witness appellee's counsel sought over repeated objections to bring out from the witness that he had visited the office of defendant's counsel and consulted them. There was no basis for cross examination of his own witness and the objections should have been sustained. As the result of such examination the witness referred twice to an insurance company, saying "I cannot say if the insurance company --," when he was interrupted by another objection, which the court overruled, and continuing he said "I know the insurance company's --" when he was again stopped. When defendant's counsel were urging their objections, appellee's counsel addressed them with the remark: "You know that his statement was made to some one in your office." Because of these references defendant's counsel moved to withdraw a juror. The court denied the motion.

Later when appellee took the witness stand she adroitly but for the manifest purpose of bringing the matter before the jury also referred twice to an "insurance company." She was being interrogated with respect to contributions she claimed to have received from individuals and concerns to a publication called "Hartley's Review," which she claimed to have conducted. She was asked if a certain bank made contributions to her personally. She answered: "And insurance

ought to be equally important and value.  
to one of the opinions. Therefore, that the  
was necessary.

But there can be no more by himself than because of  
practical error. Therefore, a second trial is not first  
adverse witness's testimony to that effect of the testimony of  
the good and ordinary, and of course immediately for being the  
evidence. It was because of the fact that the witness that  
general for evidence represented an important category in the  
finding the case. Under the project of the right to appear  
examined the new witness appeared a second time to appear  
objection to being and from the witness that he had stated  
the effect of defendant's counsel was established there. There was  
no basis for more examination of his own witness and the  
evidence who is not from evidence. It is the fact of the  
examination the witness returned back to be in witness category.  
evidence: it cannot say it is the witness category - "then he was  
introduced by another objection, which the court overruled, and  
continued he said "I know the defendant company's - " then he  
was again accepted. Then defendant's counsel were making their  
objection. Therefore, counsel - witness then the witness  
then knew that his statement was not to come out in front  
evidence. Because of these statements defendant's counsel could  
to withdraw a jury. The court called the witness.  
later when again the witness stand the  
evidence but for the material purpose of bringing the matter  
before the jury also returned back to be in witness category."  
The case being interrupted and subject to consideration the  
evidence on how counsel from evidence and witness to be  
re-examination - witness the witness, which the witness to  
have continued. The case called in a witness from witness  
evidence to be determined. The answer: "and defendant

companies and other people, too." When asked if she mailed a copy of the "review" to the president of said bank "individually and personally," she replied: "Or to the corporation or insurance company or anyone else." There was no proof whatever that any insurance company had contributed to such publication, or that she had mailed the same to any particular insurance company. We cannot but be impressed that appellee's references to insurance companies were uncalled for and designedly made. As said in McCarthy v. Spring Valley Coal Co., 232 Ill. 473, the questions and circumstances were well adapted to intimate strongly to the jury that the appellant was insured against liability for accidents of this kind, and that the insurance company would have to respond for any judgment which might be rendered. We cannot tell the effect the line of questioning referred to and such answers may have had. We may repeat what was said in Monblatt v. Young, 199 Ill. App. 312:

"The absence of any legal ground therefor and the persistence in that line of examination against defendant's objections and the open charge that it was for an improper purpose, indicate a deliberate intention to bring the matter before the jury and risk the consequences."

The authorities cited in the opinion of said case clearly show that such questioning and answers were calculated to be highly prejudicial and call for a reversal of the judgment and remanding the cause. This conclusion will obviate the necessity of reviewing other alleged erroneous rulings not likely to occur in another trial.

Accordingly the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Mitch, JJ., concur.



composition and other people, etc. When asked if the writer  
 copy of the "Review" in the present of will be financially  
 and personally, the writer: "No, in the corporation of inter-  
 come because of expense and." There was no great objection that

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E. L. GEORGE, Appellee,

vs.

GEORGE H. J. HAAS, Appellant.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

Appellant executed his promissory note whereby he promised to pay to W. F. Nelson, Santa Fe, Isle of Pines, (in the West Indies) \$1,715.61, at a bank in said island, with interest at ten per cent per annum. Appellee became the owner of the note, and sues the maker thereon.

No question arises as to the principal of the note, and a separate judgment for the amount thereof admitted to be due was entered pursuant to our practice. This appeal is from a judgment for the interest on the principal computed at the rate of ten per cent per annum amounting to \$660.47.

Appellant pleaded the note was usurious. The court found the issue against him.

The facts are undisputed. The decisive fact is that after executing the note appellant, who lived in Chicago, personally deposited it in the United States mail, directed to said Nelson at the place designated in the note, where Nelson in due course received it by mail. Under the authorities, therefore, the contract was made in Illinois, and under our statute no recovery can be had for interest where it exceeds seven per cent upon any written contract made in this state, wherever payable. (Cahill's Stats. ch. 74, secs. 6 and 8.)

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It is well established law in this State that "the place where the contract is made determines its validity and the place of performance affects only the time, mode and extent of the remedy;" (Burr v. Beckler, 264 Ill. 230) and the place where the contract is made depends "upon the place where it is delivered, as consummating the bargain;" (Walker v. Lovitt, 250 id. 543, 546; Gay v. Rainey, 89 id. 221) and "where the parties are at a distance from each other, placing a note in the mail, addressed to the payee, constitutes a delivery of the note." (Trego v. Estate of Cunningham, 267 id. 367, and cases cited.)

Appellant urges that the agreement was not complete between the maker of the note and the payee until it was accepted, and contends that its acceptance must be deemed to have been made where and when it was received. The note having been retained after it was received the acceptance thereof must be deemed to have been at the place of delivery, for it was there appellant lost control of it. (Burr case, supra.)

There is nothing in the facts of this case to distinguish it from the cases cited so far as the application of the principles governing them is concerned. It follows upon the undisputed facts that as the contract was made in this State and was usurious, the judgment for interest cannot stand and must be reversed with a finding of facts.

Cases cited by appellee decided before the revision of the Interest Act in 1879, in section 8 of which were incorporated the words "wherever payable," and rulings in other jurisdictions that conflict with said Act, are not applicable.

REVERSED AND REMANDED WITH A  
FINDING OF FACTS.

Gridley and Fitch, JJ., concur.

It is well established law in this State that

since there has continued in such determination the validity and  
the place of residence affects only the time, mode and extent  
of the remedy." (WILL V. WILSON, 100 Ill. 283) and the place  
where the contract is made governs "when the place where it is

delivered, as constituting the remedy." (WILL V. WILSON,

100 Ill. 283, 284; WILL V. WILSON, 100 Ill. 283) and where the

parties are at a distance from each other, delivery is made in  
the place, ascertained in the proper, constituted authority of the  
state." (WILL V. WILSON, 100 Ill. 283, 284, and cases

cited.)

It is well established law in this State that

between the maker of the note and the payee until it was assigned,  
and contained that the assignee must be deemed to have been made  
there and then it was assigned. The note having been assigned  
after it was received the assignee must be deemed to  
have been at the place of delivery, for it was there assigned

last contract of 17. (WILL V. WILSON, 100 Ill. 283.)

There is nothing in the facts of this case to distinguish

it from the cases cited in the opinion of the court in the  
precedent cases in connection. It follows from the opinion and facts  
that as the contract was made in this State and was assigned, the  
assignment law of this State must govern and must be reversed, with a

finding of facts.

Cases cited by appellee follow below the finding of  
the interest set in 1790, in section 17 of which was incorporated  
and which "transfer property" and which in other jurisdictions  
that conflict with said law, and are applicable.

REVEREND AND HONORABLE JUDGE  
COURT OF THE STATE.

GRANT and LATH, vs. WILSON.



We find that the note in question was executed and delivered in this State and that the interest for which the judgment appealed from was given is usurious and uncollectible under the Interest Act of this State.

The following are the names of the persons who have been elected to the various offices of the Association for the year 1911-1912. The names are given in the order in which they were elected, and the names of the persons who were re-elected are given in parentheses.

The following are the names of the persons who have been elected to the various offices of the Association for the year 1911-1912. The names are given in the order in which they were elected, and the names of the persons who were re-elected are given in parentheses.

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The following are the names of the persons who have been elected to the various offices of the Association for the year 1911-1912. The names are given in the order in which they were elected, and the names of the persons who were re-elected are given in parentheses.

293 - 28128

AARON JAY and JANE JAY,

Appellees,

vs.

JOHN SPIENS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

From a judgment against defendant for possession in a forcible detainer suit brought in the Municipal Court of Chicago, he has appealed, assigning errors upon a short record showing a previous judgment for possession against him in that court on June 13, 1922, that it was vacated on appellees' motion three days later, that the case was set for trial on the 20th, and heard on the 24th of the same month when the judgment appealed from was entered. The other orders in the short record have no bearing on the points raised for reversal.

The main point is the court was without jurisdiction to render judgment. This point is based upon the fact that as the placita shows the judge presiding at the trial was a judge of the County Court of Jefferson County, Illinois, "holding," as stated therein, "a branch of the Municipal Court of Chicago, at the request of the judges of said Municipal Court," the record should disclose that said judge from another county had been requested to hold court for a particular judge of the Municipal Court and for a specified period of time, and that in the absence of such a showing he did not have the authority vested in him by section 13 of the Municipal Court Act to enter the judgment. Said section reads as follows:

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U. S. DEPT. OF JUSTICE

TO THE  
HONORABLE  
JUDGE  
OF THE  
COURT

IN REPLY TO YOUR LETTER OF THE 27TH INST.

When a judgment against defendant for possession in a  
forcible detainer was entered in the Municipal Court of Chicago,  
he has appealed, claiming errors upon a point raised during a  
preliminary hearing for possession against him in that court on  
June 12, 1933, and it was ordered on appeal, under those  
facts later, that the case was set for trial on the 28th and  
heard on the 29th of the same month when the judgment appealed  
from was entered. The only error in the above record have no  
bearing on the points raised for reversal.

The main point in the case was without jurisdiction  
to render judgment. This point is based upon the fact that on  
the 12th of June the judge presiding in the trial was a judge  
of the County Court of Lawrence County, Illinois, "acting"  
as stated therein, in breach of the Municipal Court of Chicago,  
of the records of the Judge of said Municipal Court, the record  
should disclose that said judge from another county had been re-  
ferred to said court for a particular judge of the Municipal  
Court and for a specified period of time, and that on the 28th  
of such a hearing he did not have the authority vested in him by  
section 12 of the Municipal Court Act to enter the judgment.

This section reads as follows:



"That the judges of said Municipal Court may interchange with judges of other city courts, and with county judges, and said respective judges may hold court for each other and perform each other's duties when they find it necessary or convenient." (Cahill's Stats., ch. 37, par. 401.)

The record shows affirmatively that the presiding judge was a judge authorized under said section and that he was requested by the proper authorities to hold a branch of the Municipal Court of Chicago. In the absence of a showing to the contrary, the regularity of proceedings will be presumed and that the request was duly made on a finding that the services of said judge were necessary or convenient. It is not essential to jurisdiction, nor does the statute require, that there be an express order setting forth the necessity or convenience that justifies the request, or that said judge was sitting for or at the request of a particular judge. The common law record, on which the errors are assigned, does not show a want of jurisdiction, and if there were any facts not so shown presented at the trial tending to disclose a lack of it or any reversible error in the proceedings, they and any motions or objections predicated thereon should be shown by a bill of exceptions, and none is preserved.

The only other points made are that the record does not show that defendant received notice of the order vacating the judgment against him, or that there was a continuance from June 20th to June 24th. Even if appellant could complain of an order entered in his favor yet the record shows he was present at the trial, and, in the absence of a bill of exceptions showing objections or motions raising these questions, he presumably waived any irregularity or informality there may have been with respect to them.

We find no reversible error in the record and the judgment is affirmed.

Gridley and Fitch, JJ., concur.

AFFIRMED.

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As a result, the following information is provided:

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Source: U.S. Census Bureau.

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SECRET

294 - 28129

AARON JAY and  
JANE JAY,

Appellees,

vs.

FRANK J. TYRRELL,

Appellant.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer. The record shows that the cause was heard before the trial without a jury, and that an order was entered finding the defendant guilty of withholding the premises from the plaintiffs, and finding the right of possession in plaintiffs. From the judgment entered thereon this appeal is taken.

On January 9, 1923, the bill of exceptions was stricken on appellee's motion, it appearing that the same was not filed within the time required by the statutes. Nearly all of the assignments of error are predicated on the stricken bill of exceptions, and no others than those so based are argued. As we are limited in consideration of the appeal to the common law record and no error therein is pointed out, the judgment will be affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

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306 - 28141

JOHN P. CONTI et al.,  
Appellees.

vs.

JOSEPH HOELLER, trading as  
WESTERN MONUMENT WORKS,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from the overruling of a motion to vacate a judgment by default for \$303.25, entered against appellant for an alleged balance due on the purchase of two monuments. As grounds for the motion it is alleged in the affidavit accompanying it (1) that appellant was taken ill in his office an hour after service of the summons upon him and was confined to his bed until after the return day and judgment, and (2) that he had a good defense, which was in effect that the monuments in question were not according to specifications but were accepted on an agreement for a reduction on the purchase price to a fair and reasonable amount, and that a fair and reasonable amount would have left a balance in his favor by reason of payments on account.

But regardless of whether the affidavit sufficiently states a meritorious defense we think the court was justified in denying the motion for failure to show due diligence in presenting it. It does not appear from the affidavit but that appellant, notwithstanding his illness, was able to communicate with his attorney and have him enter appellant's appearance and file necessary papers before the return day of the writ

*(continued)*

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Figure 1. The effect of the concentration of the inhibitor on the rate of polymerization.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

See index and references for (a) all publications; (b) 1971-72

... of some persons and to be extremely careful to avoid any further delay in the work of the

*The author wishes to thank the following people for their assistance:*

2. *Journal of the American Statistical Association*, 1991, 86, 103-110.

1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

$$\lambda = 0.2, 0.4, 0.6, 0.8, 1.0, \quad \delta = 0.2, 0.4, 0.6, 0.8, 1.0, \quad \beta = 0.2, 0.4, 0.6, 0.8, 1.0, \quad \gamma = 0.2, 0.4, 0.6, 0.8, 1.0, \quad \alpha = 0.2, 0.4, 0.6, 0.8, 1.0,$$

Journal of Management Education 32(10)p.1131-1147

© 2001 Blackwell Science Ltd, *Journal of Internal Medicine* 250: 103–110

instead of afterwards. In such a case the affidavit will be construed most strongly against the applicant. (Stanton Coal Co. v. Menk, 127 Ill. 369.) The rule is well established in this State that motions of this character to set aside a default are addressed to the sound discretion of the court and will not be reviewed except in case of abuse of such discretion; also that a party seeking to have a default set aside must show due diligence to protect his rights and that he has a meritorious defence, but a showing of a meritorious defense alone is not sufficient. (Hitchcock v. City of Chicago, 280 Ill. 268.)

Accordingly the judgment is affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

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• 2000 (1999)



THE PRUDENTIAL INSURANCE COMPANY,  
OF AMERICA, a corporation,

vs.

MARIE DAIGER, administratrix, etc.,  
Appellee,

On appeal of J. ARTHUR SWENSON,  
Appellant.

APPEAL FROM

SUPERIOR COURT OF  
COOK COUNTY.

220 ILL. 349<sup>2</sup>

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

The Prudential Insurance Company issued its policy of insurance on the life of Frank A. Daiger, for \$1,000, payable to his executor, administrators or assigns. About two months later he assigned it to J. Arthur Swenson "as his interest may appear." Swenson was the cashier and assistant manager of F. W. Faber, Inc., a corporation. Daiger was in its employ as a salesman from prior to the time of his assignment up to the time of his death. At that time said corporation had advanced him \$989.92 in excess of his salary. The payments were made by its checks, signed by Swenson and countersigned by its manager, and the assignment of the policy was made to secure such advances.

Marie Daiger, the widow of said Daiger, was appointed administratrix of his estate, and in that capacity sued the Insurance Company upon the policy. In view of such suit and the claim of Swenson as assignee of the policy, the Insurance Company filed its bill of interpleader asking for an injunction against the prosecution or institution of suits against it upon the policy, that said claimants make defendants thereto interplead, and that it be permitted to pay the amount of the policy, less

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its costs, into court and be dismissed out of the case. An order to that effect was entered and each of the claimants answered, the administratrix alleging that the assignment was without consideration and in fraud of her rights, and Swenson alleging in substance that he claimed the insurance as agent and attorney for G. W. Faber, Inc., by reason of such advances and the assignment of the policy to secure G. W. Faber, Inc., for the same.

Upon the hearing the administratrix introduced proof of the policy, and of issuance of letters of administration to her. Thereupon Swenson made proof of the facts substantially as pleaded by him, showing that the money paid to Frank E. Daiger, deceased, was the money of G. W. Faber, Inc., and was charged against Daiger on its books, and that the policy assigned to him was delivered by said Daiger to the company's manager and held by it as security for advances made and to be made in the future. At the close of the evidence G. W. Faber, Inc., was given leave to file its intervening petition without prejudice to the evidence taken, and defendant's answers were allowed to stand as answers thereto, no additional evidence being offered.

The intervening petition set up no facts or claim different from those set up in Swenson's answer, namely, that he was at all times acting as its agent or trustee, and that the policy was assigned to him as collateral security for such advances and for its benefit. And the undisputed evidence sustains that contention. It thus appears that Swenson had no personal interest in the insurance, and claimed none, but pleaded in a representative capacity for the corporation.

The decree found Swenson failed to prove that he gave any consideration for the assignment, or that he was entitled

[illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive one.

[illegible]

THE ABOVE INFORMATION IS FOR THE USE OF THE FBI ONLY AND IS NOT TO BE DISCLOSED TO ANY OTHER AGENCY OR INDIVIDUAL WITHOUT THE WRITTEN AUTHORIZATION OF THE FBI.



to the proceeds of the policy, either for himself or as agent or trustee for G. W. Faber, Inc., and that the evidence was not sufficient to entitle G. W. Faber, Inc., to the proceeds, but that the administratrix was entitled thereto.

From this decree Swenson alone appealed, and has assigned as errors the findings as aforesaid, that the decree was in favor of the administratrix and against himself, and that it is contrary to the evidence and the law.

In Pruss v. Woodley, 160 Ill. 433, where the trustee and beneficiary were both parties to a suit in equity, and the trustee alone appealed, assigning no error prejudicial to himself, the court said that by his appeal he attacked as trustee the findings in the decree so far as they were prejudicial to his beneficiary, that in other words he prosecuted the appeal in his own name, but for his beneficiary. Holding that "he had the right to appeal from the decree, but for himself only," the court said that "a party cannot assign for error that which does not affect him, but is prejudicial only to others who do not complain." (p. 437)

The corporation intervened in its own behalf, alleging that Swenson was merely its trustee in the matter, presumably because, as said in that case, "in equity the party in whom is the beneficial interest must sue in his own name." (p. 436) Referring to the rights of the beneficiaries in the case the court said it would be time enough to determine whether or not error had been committed against them "when they come and make complaint." (p. 437) The assignment of error in that case not calling in question the correctness of any ruling of the court affecting appellant as trustee the judgment of the Appellate Court affirming the decree was affirmed. While in this case it is assigned as error that the court found that Swenson was not

to the presence of the policy, which was intended to be an aid  
in providing the U.S. with information, and that the evidence was  
not sufficient to establish a violation of the Espionage Act,  
and that the defendant was entitled to judgment.

and the following were present: [illegible]  
[illegible] [illegible] [illegible] [illegible] [illegible]  
[illegible] [illegible] [illegible] [illegible] [illegible]  
[illegible] [illegible] [illegible] [illegible] [illegible]  
[illegible] [illegible] [illegible] [illegible] [illegible]

in Pratt v. Pratt, 100 Ill. 101, where the court said: "The husband's duty to support his wife is a duty to support her in a manner consistent with the habits and station of the family at the time of the marriage."

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Finally, the last step in the process is to implement the plan and monitor the results. This involves putting the plan into action and tracking the progress of the solution. Once the problem has been solved, the final step is to evaluate the results and determine if the solution was effective. This involves comparing the results of the solution to the original problem and determining if the problem has been solved. If the problem has not been solved, the process may need to be repeated.

The above information is in accordance with the records of the Bureau of Census.

[REDACTED]

Very truly yours,  
[REDACTED]  
Special Agent in Charge

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed changes to the law of the United Kingdom relating to the treatment of the children of the United Kingdom who are born in the United Kingdom and who are the children of a United Kingdom citizen and a foreign citizen.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes of the problem. Once the causes of the problem have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the final step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

entitled to the proceeds of said policy "either for himself or as trustee for G. W. Faber, Inc.," yet the evidence shows that he had no other interest than as trustee, and the argument in his behalf is based solely on that theory. As, therefore, Swenson neither had nor claimed a personal interest that is affected by the decree or rulings of the court, and cannot assign error for his beneficiary when it has appeared and pleaded in its own behalf but not seen fit to complain of the decree, we must hold, in accordance with the rulings in the Pragg case, that no error was committed as to him and that no question of error as far as the rights of G. W. Faber, Inc., are concerned, is before us for consideration.

Accordingly the decree is affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.





325 - 28160

LILLIE S. FARLISH, <sup>High</sup>  
Appellee.

vs.

CITY OF CHICAGO,  
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a personal injury suit predicated on the charge that the City of Chicago negligently suffered a street to remain in unsafe repair and condition whereby plaintiff while in the exercise of ordinary care for her own safety unavoidably fell into an excavation, thus causing the injuries complained of. There was a jury trial and a judgment for \$7,500 was entered upon the verdict in plaintiff's favor, from which the city appeals.

The accident happened about 5:30 p.m. September 24, 1919, while plaintiff, a woman about 57 years old, was crossing to the east on Babash avenue, Chicago, a north and south street, along with a young lady companion. She had just alighted from a street car going south on said avenue at the north side of its intersection with Seventh street. As she reached about the middle of the east or northbound car track a street car was coming north thereon a short distance from her, which did not stop at the crossing, and another coming south on the southbound track also a short distance from her. Not until then did she notice the alleged excavation or ditch in question, which was just beyond the east rail of the northbound track and, as claimed by plaintiff's witnesses, extended both north and south of the crossing.

WILLIAM A. WILSON,

Defendant,

vs.

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

County of New York.

CITY OF NEW YORK.

Indictment.

WILLIAM A. WILSON, Defendant,

is charged with the crime of

This is a personal injury case and is

to be tried in the County of New York.

to be tried in the County of New York.

while in the exercise of his duty as a

consequently he is now an accused, and

judges complained of. There was a jury trial and a judgment

for \$7,500 was entered upon the verdict in defendant's favor.

from which the city appeals.

The incident happened about 11:30 p.m. September 11,

1910, while defendant, a woman about 37 years old, was

on the east of Second Avenue, Chicago, a north and south street,

along with a young lady companion. She had just alighted from

a street car being south on said avenue at the north side of

the intersection with Second Street. As she reached about the

middle of the east of Second Avenue and there a street car was coming

from between a short distance from her, which she saw stop

and crossing. At another point in the neighborhood where

also a short distance from her. And until then she had

the alleged conversation to him in relation, which was later

the east side of the neighborhood from and as stated by him.

His statement, admitted both before and after the hearing.

She looked for and saw no means provided for crossing the same. And there was none. She apparently would have had time to cross in safety but for the so-called ditch. Perceiving that she was in danger of being caught between the two cars if she stood between the two tracks and that she did not have time to recross in front of the southbound car and was in danger of being struck by the northbound car, she attempted to step or jump across the excavation or ditch in question. Her foot reached the opposite side but slipped on the dirt, as she testified, causing her to fall back into the ditch and strike her shoulder against some object on the other side, thus causing the injuries in question. A man on the street helped her out of the excavation. Her companion also attempted to cross the same and likewise fell. Some of plaintiff's witnesses testified that for some days previous to the accident pedestrians using the crossing had to jump across said ditch, and that the ditch was one and one-half to two feet wide and about the same depth.

At the time in question the street was being repaved under contract and the supervision of the city's inspectors. It cannot be questioned that the city was liable if it was negligent in failing to discharge its duty to keep the street in repair and safe condition for travel, if plaintiff's injuries were occasioned thereby and she was in the exercise of ordinary care for her own safety. (Johnston v. City of Chicago, 258 Ill. 494; Manrahan v. City of Chicago, 289 id. 400, 405; City of Beardstown v. Smith, 150 id. 169.) And plaintiff unquestionably had a right to assume that the street was safe for crossing at the usual place therefor if she had no notice or knowledge to the contrary, as she testified. Under such circumstances she was required to use only ordinary care for her



The fact that the law was not provided for opening the door.  
and there was none. The apparently rapid pace had been to cross  
in safety but for the so-called ditch. Involving that the law  
in danger of being caught between the two cars if the ditch between  
the two cars and now the law was there to prevent it from

of the combined car and the danger of being struck by the  
northbound car. The attempt to stop or jump across the excavation  
on which in question. The fact remains the excavation was not  
aligned on the left, on the right, causing the car to fall back  
into the ditch and strike the car which was stopped on  
the other side, thus causing the injuries in question. A man  
on the street failed to get out of the excavation. The excavation  
also attempted to cross the road and likewise fell. Some of  
Kleinert's statements indicated that the car was provided for  
the accident between the car and the excavation but to jump across  
the ditch, and that the ditch was not the fault of the law  
which had built the road bridge.

As the ditch in question the ditch was being repaired  
which caused the danger of the ditch in question.

It cannot be questioned that the city was liable for its  
negligence in failing to keep the ditch in question in  
the repair and also condition for travel. In Kleinert's report

the facts concerned thereby and the law in the accident of  
ordinance was not the law. (Kleinert v. City of Chicago,  
200 Ill. 404; Kleinert v. City of Chicago, 200 Ill. 404;  
City of Chicago v. Kleinert, 200 Ill. 404.)

questionably has a right to know that the street was not for  
travel at the same place whether it was not the same as  
travel at the same place, or was not. The same was the  
condition of the street at the same place as the same



own safety. (City of Chicago v. Babcock, 143 Ill. 558, 363.)

The real controversy seems to be as to the depth of the excavation. The excavating was done by a steam shovel which, according to the testimony of the city's witnesses, went to the depth of about thirteen inches below the surface of the street and picked up the earth and the old pavement. In the process there would be some variation in the depth, necessitating filling and leveling. A so-called "header," consisting of stone blocks from four to six feet long, four inches thick and about ten inches deep, were set in concrete about twenty inches from the outside rail so that when placed they projected about five inches above the surface of the concrete. On the concrete between the header and the street curb were laid concrete blocks, and on the concrete between the header and the car rail granite blocks.

It was the contention of the city that at the time of the accident the concrete had been set so that there was only a depth of five inches in the so-called excavation between the car rail and the header. The testimony of the city's witnesses as to the condition of the street at that point was more or less contradictory. If the excavation had been made and the concrete not placed in at that point the condition would correspond to something like the version given by plaintiff's witnesses, otherwise to that given by defendant's witnesses. After close examination of the testimony on the subject we do not feel justified in disturbing the jury's conclusion either as to the question of negligence or contributory negligence. It appeared that pedestrians were crossing the street daily at that point, that barriers were placed against traffic north and south on Babash avenue, but removed after five o'clock when the laborers quit work on the street, and that no planking or other conveniences were provided for crossing the torn up part of the street.

and the other, the latter being the more important.

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while lights were placed there at night, the accident occurred in daylight.

Whatever the depth of the ditch or excavation the testimony supports the inference that it may not ordinarily have been observed by a pedestrian crossing the street until just before reaching it. At that time plaintiff, who otherwise would have had sufficient time to cross the tracks before she would have been in danger from either of the cars, suddenly found herself confronted with the danger above stated. It is unnecessary to review authorities to the effect that a person in such a situation is not, as a matter of law, chargeable with contributory negligence. Whether she was or not was a question of fact for the jury, and we cannot say that their finding thereon was manifestly against the weight of the evidence. (C. & N. W. R. Co. v. Gerson, 198 Ill. 102; Dunham Towing & Dracking Co. v. Dauselin, 146 Ill. 416.) It was also said in City of Rock Falls v. Wells, 189 Ill. 324, 327, that if one while observing due care for his personal safety is injured by the combined result of an accident and the negligence of the city, and without such negligence the injury would not have occurred, the city will be held liable, although the accident be the primary cause of the injury, if the consequences could, with common prudence and sagacity, have been seen and provided against by the city. We think the evidence was such as to bring the case within such rule, which was substantially stated in given instructions.

Defendant's witnesses testified that there were records in the possession of the contractors and the city which would show the actual progress of the work and condition of the street on each day. But as no effort was made to produce them the jury may well have inferred that they would not verify defendant's evidence as to the condition of the street, and that there was



with light and dark as well as the various colors  
in nature.

However the type of the color is determined by  
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which is illuminated. In the case of the light  
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which is illuminated, the color is determined by the  
nature of the object. In the case of the light  
itself, the color is determined by the nature of the  
source of the light. In the case of the object  
which is illuminated, the color is determined by the  
nature of the object.

1. The color of the light itself is determined by the  
nature of the source of the light. In the case of the  
light itself, the color is determined by the nature of  
the source of the light. In the case of the object  
which is illuminated, the color is determined by the  
nature of the object. In the case of the light  
itself, the color is determined by the nature of the  
source of the light. In the case of the object  
which is illuminated, the color is determined by the  
nature of the object.

2. The color of the object which is illuminated is  
determined by the nature of the object. In the case of  
the object which is illuminated, the color is determined  
by the nature of the object. In the case of the light  
itself, the color is determined by the nature of the  
source of the light. In the case of the object  
which is illuminated, the color is determined by the  
nature of the object.



a ditch or excavation into which, in the absence of some provision for crossing the same, and as the result of her sudden danger, plaintiff fell. We are not disposed, therefore, to disturb the jury's conclusion of fact as to the city's negligence and plaintiff's want of contributory negligence.

It is claimed that the verdict was excessive. We are not prepared to say so. She fell on her right shoulder and was painfully injured. The ball and socket joint of the right shoulder was shattered and her arm was driven into the shoulder. Her right arm was partially paralyzed, causing a fifty per cent limitation so that she is unable to perform the work she was accustomed to do in her business of dress-making, or to put on her clothes or dress her hair without help, so that she has been required to employ a woman for such purposes at the rate of \$85 per week. With her hospital expenses and pecuniary loss of employment, doctors' bills, etc., she had expended about \$4,000 before said trial. Many similar cases might be cited where larger judgments were permitted to stand.

Complaint is made of the refusal of an instruction tendered by defendant as to the credibility of the witnesses. The instruction is in due form and might well have been given, but a cautionary instruction is within the discretion of the court (Layndale Steam Dye Works v. Chicago Daily News Co., 189 Ill. App. 565), and we do not think it is apparent that the jury would have reached a different verdict had it been given. As said in Young v. McConnell, 110 Ill. 83, "all persons know, without being instructed, that a person who testifies falsely to a material fact in a case is unworthy of belief."

The judgment is affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.



CHICAGO TITLE & TRUST COMPANY,  
a corporation, Trustee,  
Appellant,

vs.

J. T. COWLES,

Appellee.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

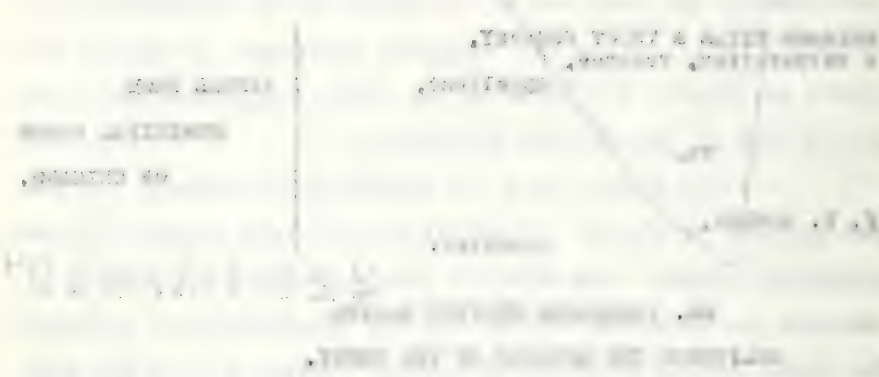
MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Appellant's amended statement of claim was based on an agreement between defendant and various other persons in consideration of mutual promises wherein he agreed to pay \$1,000 to appellant as trustee of a property owners association when called upon to do so, and his refusal to pay the same. A copy of such agreement is made a part of the statement of claim. Appellee Cowles in his affidavit of merits denied any indebtedness, and alleged that he agreed to subscribe such sum providing plaintiff would keep "undesirable persons" from becoming tenants and owners of property in a certain neighborhood, and that plaintiff has not complied with that agreement.

The legal issue thus presented was whether the defendant executed such an instrument as was declared upon, and, if so, whether he was indebted for such sum. The allegation in defendant's affidavit of merits that he made a different kind of agreement was not pertinent to such issue. Either he made such an agreement as declared upon or he did not. The court before whom the trial was had without a jury found the issues against the plaintiff. From the judgment entered thereon plaintiff appeals.

The bill of exceptions discloses that in the admission of testimony there was a wide departure from the real issues of



The diagram illustrates the relationship between the vertical and diagonal lines. The vertical line is shown as a straight line, while the diagonal line is shown as a line that is not perpendicular to the horizontal line. The horizontal line is shown as a line that is perpendicular to the vertical line. The oblique line is shown as a line that is not perpendicular to the horizontal line.

The diagram is a simple geometric representation of the relationship between these lines. It shows that the vertical line is perpendicular to the horizontal line, while the diagonal line is not. The oblique line is also not perpendicular to the horizontal line.

The diagram is a clear and concise way to show the relationship between these lines. It is easy to understand and it is a good example of how to use a diagram to illustrate a concept.



the case. The main and controlling question here is whether the court erred in rejecting the written agreement offered in evidence by the plaintiff. It seems to have been rejected on two grounds; first, that it was not properly executed, and, secondly, because it was against public policy. A decision of these points does not require setting out the contract, which is lengthy, the declared object of which is "the acquisition, management, improvement and disposition, including leases, subleasing and sale of residential property to both white and colored people" within a certain described district. The contract provided for a conveyance of the title to all of said properties so to be conveyed to plaintiff as trustee to be held upon the trust declared in the agreement, which need not be set forth. It sets forth its object as aforesaid, the powers of the trustee and that the subscribers were to hold certificates representing their proportional interests in the proceeds, net income and avails of the premises so held in trust. There is nothing ambiguous, obscure or uncertain as to the purposes and intent of the agreement and, therefore, there was no occasion to resort to oral evidence to ascertain the same. It contains no such word as "undesirables" and discloses no purpose, as claimed by oral testimony, to discriminate between white and colored persons. The greater part of the evidence was with reference thereto and was wholly irrelevant to the issues.

The court, therefore, acted upon improper evidence in rejecting the instrument on the ground that it was against public policy, as perhaps some of the oral evidence might indicate.

The court also erred, in our opinion, in rejecting the same upon the ground that it was not properly executed. In order to procure the signatures of the parties thereto, over one hundred and twenty-five persons, one copy of the agreement was kept at the office of the association for such as signed there, and two other copies were used by persons in procuring the signatures of



the others at their houses or places of business. The signatures were afterwards detached from two of the copies and appended to one agreement. When the necessary \$100,000 called for by the agreement were subscribed the subscribers were called together at a meeting at which a notary public was present, and the announcement was made that they "had gone over the top" and would take the various lists and make one complete list of them, which was done, and the notary then present went around and asked the various members to verify their signatures and took their acknowledgments thereof. The instrument offered in evidence contains all of said signatures and the notary's certification to the acknowledgment to each of them in the usual form and bears his notarial seal and signature. Defendant admitted that his signature was among the others but claimed that when he made it the agreement was not attached thereto. He, however, admitted being present at the meeting where and when the acknowledgments of the signatures as aforesaid were taken. He thinks, therefore, there was prima facie proof of the execution of the document offered in evidence and that it should have been received. The judgment will, therefore, be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Gridley and Fitch, JJ., concur.





377 - 28212

ALFRED REMBERT et al.,

Appellees.

vs.

IRVING FRIDMAN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

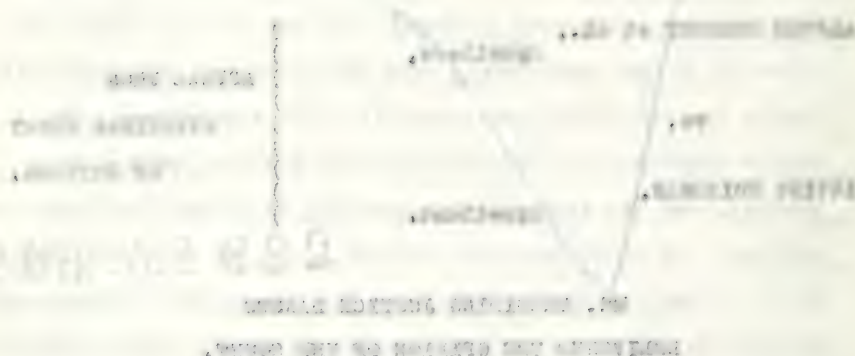
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for possession of premises held by appellant under a written lease from appellees' grantor, one Malkus, which expired by its terms on April 30, 1922, and provided for an option of an additional term of two years upon giving sixty days notice in writing of the lessee's intention to exercise it. Malkus disposed of the premises to appellees on March 13, 1922, and assigned to them his interest in the lease.

There was only one disputed question of fact for the determination of the jury, namely, whether a written notice of the exercise of the option was served on the lessor February 24, 1922, as testified to by appellant, and a girl who worked for him. Appellant introduced in evidence what he claimed was a copy of the written notice he handed Malkus on that date. The latter testified that there was no written notice handed to him, but that they had a conversation to the effect that appellant understood that Malkus was selling the place and wanted him to see that appellant got the flat for two years longer, and that he replied that he had practically settled the deal, and that appellant would have to take up the matter with the new owner. Six days later he notified appellant by letter that as the latter



This is an expert from a telephone company  
 provided with a telephone number from the  
 company, and the number, which is 100-1000, is  
 1000, and provided for an additional number of 1000  
 years after giving away the number in writing of the  
 intention to exercise it. The number 1000 is  
 specified as being in 1000, and assigned to the  
 in the house.  
 There was only one assigned number of 1000 for the  
 operation of the house, namely, the number 1000, which is  
 the number of the house and the number 1000, which is  
 1000, as testified to by the witness, and a girl who worked for  
 him. The witness testified that evidence was obtained from a  
 copy of the witness which he handed to him on the date. The  
 witness testified that there was no written notice handed to him,  
 but that they had a conversation to the effect that the witness  
 understood that the witness was making the place and wanted him to  
 see that the witness had the first for two years longer, and that  
 he testified that he had previously written the date, and that  
 the witness would have to take up the matter with the house owner.  
 Six days later he testified again that he had the witness

had not exercised his option, he would want possession of the premises on April 30, 1922.

The burden was on appellant to show that he gave due notice of the exercise of such option, and the jury were so instructed. Their verdict was for plaintiff, and we cannot say that it was manifestly against the weight of the evidence, as contended by appellant.

There were circumstances outside of the direct testimony on the subject which the jury may well have taken into consideration. One was that the copy of the notice introduced by appellant contained a form for the acknowledgment of the receipt of said notice and a blank for Malkus' signature thereto, and notwithstanding he claimed to have served the notice personally and to have written in the date of service in the blank for that purpose, and was at that time on good terms with the lessor, he did not secure or even ask for his signature thereto, as it is reasonable to suppose he would have done under the circumstances.

It also appears that the lessor sent him a registered letter under date of March 2, 1922, saying therein that by reason of appellant's failure to exercise the option provided for in the lease the lessor elected to have it terminated on April 30, 1922, and demanded possession of the premises on that date. The jury may well have inferred that lessor would not have written such a letter if in the presence of another party he was served with such notice only six days before, and that otherwise appellant would have demanded some explanation from him. But there was no subsequent communication between them on the subject.

It is also urged that the argument of appellees' counsel to the jury was prejudicial to defendant, but we find nothing therein that would justify a reversal of the judgment, which will be affirmed.

Quillen and Pitch JJ. concur.

AFFIRMED.



had not exercised his option, he would want possession of the

premises on April 1st, 1931.

The tenant was on occasion so slow that he gave the  
notice of the exercise of such option, and the fact was not  
disputed. Their verdict was for plaintiff, and he cannot say  
that it was manifestly against the weight of the evidence, as  
contended by defendant.

There were circumstances outside of the direct testimony  
on the subject which the jury may well have taken into consideration.  
One was that the copy of the notice furnished by defendant contained  
a form for the acknowledgment of the receipt of said notice and a  
blank for plaintiff's signature thereon, and notwithstanding the fact  
he have served the notice personally and so have written in the last  
of notice in the blank for that purpose, and was at that time so  
kindly treated with the tenant, he did not accept of such form for his  
signature thereon, as it is reasonable to suppose he would have  
done under the circumstances.

It also appears that the tenant sent him a registered  
letter under date of March 11, 1931, advising plaintiff that he was  
at plaintiff's failure to exercise the option provided for in the  
lease the tenant elected to have it terminated on April 1, 1931,  
and demanded possession of the premises on that date. The jury  
may well have inferred that tenant would not have written such a  
letter if in the presence of another party he was served with  
such notice only six days before, and that defendant's complaint  
would have contained some explanation from him. But there was  
no subsequent communication between them in the subject.

It is also urged that the argument of plaintiff's counsel  
as to the fact was prejudicial to defendant, but we find nothing  
therein that would justify a reversal of the judgment, which will  
be affirmed.



LEWIS H. PAUL,  
Appellee,  
  
vs.  
  
PETER HAA,  
Appellant.

APPEAL FROM  
  
MUNICIPAL COURT  
  
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT:

This appeal seeks to reverse a judgment entered by the Municipal Court of Chicago finding appellant guilty of unlawfully withholding from appellee possession of the third apartment in the building at 3736 Sheffield Avenue, Chicago.

The record shows that appellant was in possession of the premises under a lease from the former owner thereof, which expired by its terms on April 30, 1922, the rent reserved therein being \$65 per month. In February, 1922, the owner notified appellant by letter that the rental for the year following the expiration of appellant's lease would be \$75 per month, "with limited amount of cleaning." Appellant remained in possession of the premises after May 1, 1922, and paid rent at the rate of \$75 per month for the months of May, June and July, 1922, but failed to pay any rent for the month of August, 1922, whereupon appellee, who had become the landlord in the meantime, served a five days notice upon appellant for failure to pay the August rent, and at the expiration of the time fixed in the notice, no rent having been paid, brought suit for possession of the demised premises. No cleaning was done in the demised apartment subsequent to May 1, 1922.

It is contended by appellant that the landlord had made an express agreement to clean the premises, which was

This report was prepared by the Bureau of the Census, Department of Commerce, and is being submitted to the Bureau of the Census, Department of Commerce, for their consideration. The Bureau of the Census, Department of Commerce, is the only agency in the Federal Government which is authorized to collect and publish statistics on the economic conditions of the United States. The Bureau of the Census, Department of Commerce, is the only agency in the Federal Government which is authorized to collect and publish statistics on the economic conditions of the United States. The Bureau of the Census, Department of Commerce, is the only agency in the Federal Government which is authorized to collect and publish statistics on the economic conditions of the United States.

the consideration for the increased rent, and that this consideration having failed the landlord had no right to demand possession on account of the tenant's failure to pay rent at \$75 per month. This contention cannot be sustained. The letter from the former owner contains no agreement to do any specific amount of cleaning at any specified time. Moreover, even if it had contained such an agreement a breach of such agreement was not available as a defense in an action of forcible detainer. (Geiger v. Brown, 137 Ill. App. 534.) This was not a suit for rent.

The objection made by appellant to the sufficiency of the five days notice cannot be considered on this appeal, for the record does not show that such objection was made in the trial court. (Hudleston v. Hutson, 173 Ill. App. 178.) The notice was in conformity with the statute, and its verification made it prima facie evidence of the facts therein stated.

No defense to the action being shown the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

The committee has the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

Very respectfully,  
 The Secretary of the Board of Directors  
 of the National Bank of Commerce  
 New York City

This was not a reply to your letter of the 10th inst.

The object of the letter was to inform you that the same had been forwarded to the proper authorities for their consideration.

Very respectfully,  
 The Secretary of the Board of Directors

of the National Bank of Commerce  
 New York City

Yours,

The Secretary of the Board of Directors  
 of the National Bank of Commerce

Yours,

Very respectfully,  
 The Secretary of the Board of Directors



329 - 28164

WILLIAM HUBKA, Appellee,

vs.

JOHN J. PERKAUS, Appellant.

APPEAL FROM

CIRCUIT COURT OF

COOK COUNTY.

229 1A. 50

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Anezka Perkaus, the wife of appellant, died April 29, 1914, in a hospital in Chicago after a month's illness. At the time she went to the hospital appellant was not living with her and their infant son was supporting them. Appellee, her brother, paid her bills at the hospital, paid the doctor's bills, paid a woman to take care of the child while the mother was in the hospital, bought needed clothing for the baby and paid some assessments on a fraternal insurance society benefit certificate for one thousand dollars to keep the same alive, his total payments for these several purposes amounting to \$226.79. After her death both her brother and husband made claims to the proceeds of the benefit certificate and to settle the dispute between them the benefit society filed its bill in equity in the Superior Court praying that the claimants be required to interplead. A decree was entered in that suit, which upon appeal to the appellate court was reversed and remanded with directions to pay the proceeds of the benefit certificate, \$915, as follows: \$136.38 to appellant personally, (commonly called Jan Perkaus) and \$778.42 to the administrator of the estate of his deceased son. (Cauka, et al. v. Jan Perkaus and William Hubka, opinion No. 24086, filed February 18, 1916, not published in full.) In the opinion filed in that case the

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1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 2684-2685, 2686-2687, 2688-2689, 2690-2691, 2692-2693, 2694-2695, 2696-2697, 2698-2699, 2700-2701, 2702-2703, 2704-2705, 2706-2707, 2708-2709, 2710-2711, 27

*Journal of Management Education*, 20(6), 709-728.

2022-24. For the 2022-24 period, the estimated cost of the plan will be \$1.1 million.

*Journal of Interpersonal Violence* 26(10) 1978-1997

<sup>a</sup>  $\chi^2$  test for independence of variables. <sup>b</sup>  $\chi^2$  test for independence of variables.

Received 20 May 1994; accepted 12 July 1994

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

[illegible]

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

*Journal of Management Studies*, 19(1), 67-80.

court said as to the claim of William Hubka, (appellee here) to be repaid "for necessities he may have furnished the deceased and her son," that he had "no proper claim against any part of this fund under the certificate of insurance involved," and that such claim "cannot be considered or determined in this suit."

Thereupon appellee filed his bill in equity in the Circuit Court of Cook County against appellant individually and as administrator of the estate of Jan Perkums, Jr., deceased, setting up substantially the same claim as in the former proceeding and praying that appellant, individually and as administrator of his deceased son be ordered to pay to appellee the amount of his advances for necessities furnished to appellant's deceased wife and son, out of his distributive share in such estate. Issues were joined and after a hearing a decree was entered. The decree finds that appellant is the only heir at law of his deceased wife and son; that appellee made payments for doctor's bills, etc., as above stated, because of the failure and neglect of appellant to furnish his wife and son with such necessities; that appellant has no means or estate out of which the claim of appellee may be satisfied except that portion of the estate of Jan Perkums, Jr., deceased, which would otherwise be paid to appellant; that said estate is now in the course of administration and that appellee is the administrator. It was therefore decreed that appellant, individually and as administrator of his deceased son, pay to appellee said sum of \$216.79 out of appellant's share of said estate.

It is insisted by appellee that the certificate of evidence was not filed in apt time. No motion to strike the certificate was made here, but if such motion had been made it would not be well founded. The decree was entered at the June





1922 term and allowed the defendant sixty days to file a certificate of evidence. Within said sixty days, the time for filing was extended to September 15th, and on September 14th another order was entered extending the time to September 22nd. The certificate was filed September 18th. In Spicha v. Insull, 278 Ill. 184, 188, it is said: "This court \* \* has repeatedly held \* \* that the trial court might, at a term subsequent to the judgment term, enter an order extending the time for signing and filing a bill of exceptions, provided the subsequent extension order was entered within the limit of the time previously allowed." To the same effect are People v. Irwin, 283 Ill. 31, 54; Richter v. U. & T. M. Co., 273 Ill. 625; Fieser v. Winkote Milling Co., 322 Ill. 132; City of East St. Louis v. Vogel, 276 Ill. 490, 493.

It is claimed by appellant that the former proceeding is res adjudicate. This contention cannot be sustained for the reason that the appellate court in that proceeding held that the claim of the brother, which is involved in this suit, "is a matter having nothing to do with the subject matter of the original proceeding and therefore it cannot be considered or determined in this suit."

It is next claimed that the decree "was an unwarranted interference with the jurisdiction of the Probate Court" and that a court of equity has no jurisdiction. We cannot agree with this contention. The decree does not attempt to interfere with the due course of administration of the Probate Court. It merely orders that appellant, who is the administrator of his deceased son's estate, as well as the individual owner of whatever balance there may be remaining in the estate after the payment of claims against the same and the costs of administration, pay to appellee the accounts appellant should have paid, but did not pay, for necessities furnished by others



to his wife and child. The decree finds he is insolvent and has nothing with which to pay this claim except what may come to him out of his son's estate. The proceeds of the estate cannot be reached by any action of law until after they are paid to him (Martin v. Martin, 187 Ill. 200), and appellee cannot, even then, enforce his claim except in a court of equity upon the equitable principle of subrogation.

The decree of the Circuit Court will be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

to his wife and child. The second thing he is concerned with  
is nothing with him to get this thing done that way now  
in his own of his own's sake. The purpose of the whole  
cannot be reached by any action of law until they are  
sent to the United States v. Wainwright, 1911, and especially  
cannot, even then, enforce his claim except in a court of equity  
upon the equitable principle of reformation.

The action of the United States will be allowed.

Wainwright,

United States v. Wainwright, 1911, and Wainwright, 1911, and Wainwright.



338 - 28173

ST. JOSEPH'S HOSPITAL,  
a corporation,

Appellee.

vs.

BURRELL ENGINEERING AND  
CONSTRUCTION COMPANY.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant and an insurance company in the Municipal Court of Chicago, setting up a claim for medical and nurses' services, hospital accommodations and medicines and dressings furnished to four of defendant's employees at defendant's request and for interest thereon, claiming there was an account stated. Each defendant filed an affidavit of merits denying any joint liability or account stated and also denying that the alleged services, etc., were furnished at the request of either or both of such defendants. There was a trial without a jury. At the close of plaintiff's evidence the court sustained a motion for a finding in favor of the insurance company, and thereupon plaintiff dismissed the suit as to that company. The statement of claim was not amended, and the trial went on as to the other defendant. After it had put in its evidence the court entered a finding in favor of appellee for the full amount of its claim, including interest. Motions for a new trial and in arrest of judgment were denied and judgment entered on the finding.

Appellant seeks to have the judgment reversed, contending that the evidence is not sufficient to warrant the court in finding that appellant had ever authorized appellee



to take care of the men in its hospital or ever agreed expressly or impliedly, to pay for the same; and also that in no event can interest be allowed on the claim.

The evidence shows that appellee operates a hospital in Memphis, Tennessee, and that on April 13, 1916, four of appellant's workmen were seriously injured by the falling of a hoisting device used by appellant in the construction of a grain elevator at Binghamton, a suburb of Memphis. One George Meyers was the foreman or local superintendent of appellant in charge of the construction of the elevator. He at once called a Dr. Everett, who appears to have been the insurance company's doctor in Memphis, and had the injured men taken to appellee's hospital. Meyers informed the sister in charge at the hospital that Thomas L. Burrell would call on her the next day and make arrangements for the care of the men. Thomas L. Burrell had been the superintendent in charge of the construction of the Binghamton elevator up to a few days before the accident, but was then superintending, on behalf of appellant, work of a similar character at Mikeston, Missouri. He was not an officer or director of the appellant company, but is the brother of James B. Burrell, who is the vice-president of the appellant company, living in Chicago. Thomas L. Burrell was notified by telephone of the facts regarding the accident and at once called his brother at Chicago by telephone and asked him for instructions. His brother, the vice-president of appellant, testified that in this telephone conversation he told his brother Thomas to go to Memphis "to see what he could do to assist and to look out for our interests and take photographs of the accident; that we were insured and to do nothing under any circumstances excepting give the men first aid."



to take care of the man in the hospital or were agreed emphatically to testify, to pay for the man; and also that in no event was interest be placed on the man.

The evidence shows that neither Spencer nor

Mr. Houghton, Treasurer, and that on April 12, 1913, four of Spencer's partners were seriously injured by the falling of a building during work in connection with the construction of a

grain elevator at Alhambra, a suburb of Memphis. The damage

reports on the extent of local responsibility of Spencer

in charge of the construction of the elevator. He at once called

Mr. Houghton, who appears to have been the insurance company's

broker in Memphis, and had the injured men taken to Spencer's

hospital. Reports reflected the state in charge of the building

that Thomas L. Hurrell would call on him the next day and make

arrangements for the care of the men. Thomas L. Hurrell had

been the representative in charge of the construction of the

Alhambra elevator up to a few days before the accident, but

was then withdrawing, on behalf of Spencer, with a

similar character as Alhambra, Memphis. He was not an officer

or director of the elevator company, but is the brother of

James C. Hurrell, who is the vice-president of the elevator

company, living in Chicago. Thomas L. Hurrell was notified by

representatives of the Texas corporation the accident and at once

called his brother as witness in reference and asked him for

instructions. His brother, the vice-president of Spencer's

testified that in their telephone conversation he said his

brother Thomas to go to Memphis to see what he could do in seeing

and to look out for the interests and take charge of the

accident; that he was assured and so on nothing would be

mentioned concerning the men that day.



The vice-president did not go to the scene of the accident at any time so far as the record discloses; but pursuant to such telephoned instructions, his brother, Thomas L. Burrell, immediately went to Memphis. There he met one Neely, the local representative of the insurance company, at appellant's office in Memphis. He testified that while he was talking to Neely Dr. Everett came in, and told Burrell that "the boys" at the hospital wanted to see him and wanted to know "what we were going to do about it;" that Burrell turned to Neely and asked him "What can we tell them?", to which Neely replied: "You can tell them you people are insured with us and they can get the best attention the hospitals at Memphis can give them;" that the doctor then said that two of "the boys" needed special nurses, and Neely said: "If they need two nurses they can have them;" that thereupon he, Burrell, went to the hospital and "saw the boys." What occurred there is shown in the testimony of Dr. Everett and the Sister in charge at the hospital.

The Sister testified that Burrell called at the hospital and told her to give the patients the best of attention and that his company would pay for everything. Dr. Everett testified that he was present when Burrell came to the hospital; that Burrell told the patients in the doctor's presence "that he had made hospital arrangements for them and that they would be taken care of and that the expense was to be borne by the company;" that Burrell asked the men "not to file any suits until he had an opportunity to go into the matter for the purpose of settling them;" and that as the doctor was leaving the hospital, he overheard Burrell say to the Sister in charge, with whom he had been talking, "That is all right, Sister, give these men all the attention they need at my company's expense."

The vice-president did not go to the scene of the accident at any time as far as the record discloses; but he went to such telephone exchanges, his brother, Thomas L. Howell, immediately went to Memphis. There he met one Kelly, the local representative of the insurance company, at Kelly's office in Memphis. He testified that while he was waiting for Kelly at Kelly's home in, was told Howell that "the boys" at the hospital wanted to see him and would be there "about an hour" to see about it; that Howell went to Kelly and asked him "What was the deal about", to which Kelly replied: "You can tell them the boys are looking for you and they are at the hospital the hospital at Memphis and give them"; that the doctor then said that one of "the boys" wanted special papers, and Kelly said: "If they want the papers they can have them"; that Howell, upon that, went to the hospital and "saw the boys". That Howell there is shown in the testimony of Dr. Everett and the latter in charge of the hospital.

The letter is dated and Howell called at the hospital and told him to give the patients the best of attention and that his company would pay for everything. Dr. Everett testified that he was given by then Howell some of the hospital; that Howell told the patients in the doctor's presence "that he had made hospital arrangements for them and that they would be taken care of and that the expenses were to be borne by the company"; that Howell asked the men that he told him would be taken care of, appearing to be into the matter for the purpose of settling (them) and that as the doctor was leaving the hospital, he ever heard Howell say to the doctor in charge, with whom he had been talking, "What is all this, doctor, give them what all the patients they need at my company's expense."

Thomas L. Surrrell in his testimony denied these conversations with the Sister and with the men regarding the payment of the hospital bills, but we think the preponderance of the evidence is in favor of appellee on this point and shows that he gave the Sisters to understand that appellant would pay the hospital bills.

It further appears from the evidence that Thomas L. Surrrell at once reported by telephone to his brother, the vice-president of appellant company, particularly regarding his talk with Neely, and generally as to the conditions he found at Memphis, and later sent to his brother a written report of the same.

We entertain no doubt, after reading this evidence, that the vice-president was fully informed regarding the facts of the accident, the injuries of the employees and what was being done for them at the hospital, and that with such knowledge he made no objection at any time to the continued treatment of the injured employees at the hospital. He testified that for about a month after the accident he "had gone on the assumption that this matter was being taken care of by the insurance company." Such an assumption could only be predicated upon the theory that appellant was legally liable for the hospital bills; for if appellant was not liable therefor, he certainly had no reason to assume that the insurance company would indemnify appellant for such expenses. If, acting upon that assumption, even though it was an erroneous assumption, he acquiesced in what his brother had promised, then appellant, in effect, notified such promise.

Both the vice-president and the secretary-treasurer of appellant company testified that about a month after the accident they were notified by the insurance company that it was not bound under its policy to pay for anything except first



Thomas L. Howell in his testimony stated that conversations with the witness and with the man regarding the payment of the hospital bill, and he thinks the proposition of the witness is in favor of settling on the bill and that that he gave the witness no indication that payment would be made.

It further appears from the evidence that Thomas L. Howell is now reported by telephone to his brother, the witness, president of hospital company, persistently requesting the bill with daily, and weekly, and monthly a written report of the witness, and that when he has given a written report of the witness.

It is further stated that the witness has been advised that the hospital bill is not to be paid.

At the hearing, the witness of the company and what was said to him by the witness, and that with such knowledge

he made no objection to the company's payment of the hospital bill, and that he has been advised that the hospital bill is not to be paid.

It is further stated that the witness has been advised that the hospital bill is not to be paid, and that he has been advised that the hospital bill is not to be paid.

It is further stated that the witness has been advised that the hospital bill is not to be paid, and that he has been advised that the hospital bill is not to be paid.

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It is further stated that the witness has been advised that the hospital bill is not to be paid, and that he has been advised that the hospital bill is not to be paid.



aid; but at no time, even after such notice from the insurance company, did they or anyone else on behalf of appellant, so far as the record shows, disclaim appellant's liability for the hospital bills or notify appellee to discontinue further treatment and care of the injured workmen.

A letter introduced in evidence by appellant from Dr. Everett to J. C. Durrell, dated June 8, 1916, would seem to show that on June 8, 1916, nearly two months after the men had first entered the hospital, the vice-president asked the doctor to tell him what the doctor recalled regarding the conversation between Thomas L. Durrell and Beely on April 13, 1916, which the doctor did in that letter, substantially as he testified later; and yet, even after receiving the doctor's letter, he sent no communication to appellee.

Under these circumstances, we think the trial court was fully justified in finding, as it did, that regardless of the question whether Thomas L. Durrell had any express authority on behalf of appellant to promise to pay the hospital bills, his acts in that respect and his assumed authority to speak on behalf of appellant were ratified by appellant.

In Toledo, Mahan & Western Ry. Co. v. Prince, 50 Ill. 27, an employee of the railroad was so badly hurt that it was necessary to amputate and the station agent called a surgeon, who attended the injured man. The station agent reported the case to the general superintendent a few days after and testified that he heard no complaint in regard to his action until he afterwards presented the surgeon's bill for payment. The jury returned a verdict in favor of the surgeon upon the ground of ratification, and the court held that proof of these facts was sufficient to sustain the verdict. In its opinion the court said, "If the



superintendent desired to save the company from being held responsible, he should, on receiving the report of the case, have dissented from the action of the station agent and directed him to apprise the surgeon of such dissent, instead of allowing the latter to continue his services under the belief that he was in the employment of the company."

It is also contended that this being an action ex contractu against two defendants, it was error after dismissing as to one defendant to enter judgment against the other without first amending the statement of claim. We have carefully examined the record filed in this case and we find that at no time in the trial court did appellant raise this point. The question is one of variance only, and in such cases the rule is that to raise that question on appeal it must appear from the record that a specific objection was made in the trial court, stating in what the alleged variance consists. "If the objecting party desired to raise the question of variance he must indicate it specifically in his objection and point out in what it consists, so as to enable plaintiff to amend his pleadings to make them conform to the evidence." Mayer v. Brensinger, 180 Ill. 110.

The trial court allowed interest on appellee's claim on the theory that there was an account stated. We find no evidence in the record of an account stated. So far as the record discloses, the only statement of account that was ever rendered to appellant was one bill sent to appellant on April 7, 1917, and the vice-president of appellant testified that he then denied liability. The error in this respect, however, can be cured by remittitur if appellee chooses to do so.

Therefore, if appellee, within ten days, shall file in this court a statement remitting all of the judgment in



the fact that the company was not a public company, and that the company was not a public company, and that the company was not a public company.

It is also suggested that this book is written by

[illegible]



excess of \$1186.75, the judgment for that amount will be affirmed; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

Barnes, F. J., and Gridley, J., concur.

of the same kind as the one which was found in the  
other cases of the same kind.

January 1900

REPORT ON THE

RESULTS OF THE

NATHAN BRODAR and SAM MOLIN,  
Copartners, Doing Business as  
Brodar & Molin,  
Appellees,

vs.

F. H. SPEICH, Doing Business  
as F. H. Speich & Co.,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for \$1,600 entered against him on April 7, 1922, by the Municipal Court of Chicago upon an instructed verdict in favor of plaintiffs in an action to recover back the purchase price, and interest, for three cars of cantaloupes shipped from Turlock, California, to plaintiffs at Chicago.

Plaintiffs were in the commission business at Chicago. On August 7, 1920, they purchased from defendant, through his authorized agent, Fry Brokerage Co., of Chicago, five cars of cantaloupes. The purchase was evidenced by the following written instrument, dated Chicago, August 7, 1920, signed by said Fry Brokerage Co., agent, and delivered to and accepted by plaintiffs:

"Sold for the account of F. H. Speich & Co., Turlock, Cal., to Brodar & Molin, Chicago, Ill., five (5) cars of cantaloupes -- shipment as follows: One on the 6th, Liberty Bell Brand; one on the 7th, Carnation Brand, as are the remaining three cars which are to be shipped one every other day beginning the 9th. Stock to be good quality and pack. Price, \$1.50 on Standards, \$1.00 on Ponies, \$0.60 on Flats. Terms f. o. b. Cash -- California acceptance. Pack heavy to standards."

The first car was delivered and paid for by plaintiffs and is not in question. Upon presentation of the drafts





with bills of lading attached for the second, third and fourth cars, but before the cars had arrived and the cantaloupes had been inspected, plaintiffs paid the sum of \$1,476 - the amount of the drafts. After arrival of the three cars and the fifth car plaintiffs ascertained upon inspection that the cantaloupes did not have "Carnation" labels on them, but "Liberty Bell" or "Fearless" labels, and refused on this account to pay the draft for the fifth car or to accept any of the four cars and demanded the repayment of said sum of \$1,476, which defendant refused to make. One of plaintiffs' witnesses testified that there was a brand of cantaloupes known to the Chicago trade as the "Carnation" brand, and other brands known as "Liberty Bell" and "Fearless," but that the "Carnation" brand was considered the best. No evidence was introduced by plaintiffs showing that the cantaloupes in the four cars were in anywise deficient as to quality or pack.

During the introduction of evidence on behalf of defendant a form of label of the "Carnation" brand of cantaloupes, known to the Chicago trade, was allowed in evidence by agreement. It bore the words "Carnation Brand, Finest Quality Imperial Valley Cantaloupes." Much of defendant's evidence as was admitted by the court disclosed that various growers of cantaloupes in California had brands for the product which they produced; that the defendant, Speich, had a "Carnation" brand for cantaloupes grown by him in the Imperial Valley, California; that no such brand was known to plaintiffs or the Chicago trade for cantaloupes which were shipped from Turlock, California; that in August, 1930, the Imperial Valley season was closed; that early in that month Taggart, a representative of the Fry Brokerage Co., called on Molin, one of plaintiffs' firm, in Chicago, and informed him that defendant was buying cantaloupes in the Turlock region, but not growing any there and could sell only what he bought; that on August 6th Taggart telephoned Molin and

1. The first of the two copies of the letter, dated 1941, was  
 2. found in the possession of the defendant, who had received it  
 3. from the plaintiff, dated the 14th of 1941. The second  
 4. of the copies, dated the 14th of 1941, was found in the  
 5. possession of the plaintiff, who had received it from the  
 6. defendant, dated the 14th of 1941. The third of the copies, dated  
 7. the 14th of 1941, was found in the possession of the plaintiff, who  
 8. had received it from the defendant, dated the 14th of 1941. The  
 9. fourth of the copies, dated the 14th of 1941, was found in the  
 10. possession of the plaintiff, who had received it from the defendant,  
 11. dated the 14th of 1941. The fifth of the copies, dated the 14th  
 12. of 1941, was found in the possession of the plaintiff, who had  
 13. received it from the defendant, dated the 14th of 1941. The sixth  
 14. of the copies, dated the 14th of 1941, was found in the possession  
 15. of the plaintiff, who had received it from the defendant, dated the  
 16. 14th of 1941. The seventh of the copies, dated the 14th of 1941,  
 17. was found in the possession of the plaintiff, who had received it  
 18. from the defendant, dated the 14th of 1941. The eighth of the  
 19. copies, dated the 14th of 1941, was found in the possession of the  
 20. plaintiff, who had received it from the defendant, dated the 14th  
 21. of 1941. The ninth of the copies, dated the 14th of 1941, was  
 22. found in the possession of the plaintiff, who had received it from  
 23. the defendant, dated the 14th of 1941. The tenth of the copies,  
 24. dated the 14th of 1941, was found in the possession of the plaintiff,  
 25. who had received it from the defendant, dated the 14th of 1941.

suggested the purchase by plaintiffs of the five cars of cantaloupes; that as a result of the telephone conversation plaintiffs agreed to purchase them at the prices mentioned in the written instrument, which was mailed by Taggart to plaintiffs on August 7th; that after the arrival of the four cars plaintiffs refused to accept the cantaloupes solely because the crates did not bear "Carnation" labels; that thereafter Taggart ascertained from defendant, and so advised plaintiffs, that said labels were not put on said crates because they were not printed in time; that between August 7th and the time of the rejection of the four cars by plaintiffs, about August 16th, the market price in Chicago of cantaloupes from the Turlock region had fallen considerably; that shortly after the rejection of the cantaloupes they were sold by the Fry Brokerage Co. for the account of plaintiffs at the best price obtainable; but that because of the decreased market price not enough could be realized to pay the freight charges and what was owing to defendant on the last car.

At this point in the trial the court said that he would not allow further evidence to be introduced but would direct the jury to return a verdict in favor of plaintiffs. Thereupon defendant offered to prove by certain commission men in Chicago in substance that all of the brands commonly used for cantaloupes of the best quality or grade were of equal value as brands; that the brand did not designate or describe the quality of the cantaloupes; that cantaloupes were bought in the Chicago market by their appearance, quality and pack, irrespective of the brand on the crate or on the wrapper; that the terms "good quality and pack" had a definite meaning in the Chicago trade, referring to smooth cantaloupes, free from blemishes and of good quality when shipped, and properly sized so that the crates would be full; that the words "stock to be good quality and pack," contained in the written



[illegible][illegible]



instrument, were a description by which such cantaloupes could be identified by any dealer; and that in August, 1930, in Chicago, cantaloupes of good quality and pack, whether labeled "Liberty Bell," "Peerless" or "Carnation," were of equal value and usually merchantable. The court refused to admit this testimony.

In section 14 of the Uniform Sales Act (Cahill's Stat. 1921, Chap. 121a, Par. 17) it is provided:

"Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

The main contention of counsel for defendant is that the trial court erred in directing a verdict in favor of plaintiffs for the amount (plus interest) which they had paid for the three cars of cantaloupes, afterwards rejected upon inspection. Counsel for plaintiffs say that the court did not err in this particular. Their argument is in substance that there is no uncertainty or ambiguity in the written instrument; that by its terms defendant agreed to sell four cars of cantaloupes of the "Carnation" brand; that this was a sale by "description," wherein there was an implied warranty by defendant that the cantaloupes should correspond with the description, "i.e. have 'Carnation' labels thereon," which admittedly they did not have; that the cantaloupes, which defendant delivered and which were labeled "Liberty Bell" and "Peerless" instead of "Carnation," were not what plaintiffs had agreed to buy; and that there was no question for a jury to pass upon and that plaintiffs had the right to reject the cantaloupes and recover back the price paid for the three cars and interest.

We are unable to say that the words "Carnation Brand," contained in the written instrument, are solely descriptive of

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\* C. 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592,

the trial court found that the defendant was not a person of good character and that the defendant was not a person of good character and that the defendant was not a person of good character.

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

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<sup>1</sup>William L. Ford, U.S. Ambassador to the European Union.[illegible]

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed changes to the law of the United Kingdom relating to the treatment of the British Commonwealth countries.

NY 100-36861-107

about military, "never did I go out at night and at

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the cantaloupes which plaintiffs agreed to purchase, especially when consideration is given to the other words, "Stock to be of good quality and pack." Clearly, defendant's agreement would not have been complied with by the delivery of cantaloupes which, though of the "Carnation Brand," were not of good quality or pack. The agreement is not altogether certain. Do the words "Carnation Brand" refer to the labels on the cantaloupes, or is it a term known to the trade and descriptive of a certain quality or grade of cantaloupes? We cannot say. Apparently the agreement needs interpretation by extrinsic evidence. Parol evidence is competent to explain words and phrases having a special meaning in a particular trade or business. (Steidtmann v. Joseph Lay Co., 224 Ill. 64, 88.) "The object in construing and interpreting an instrument is to ascertain and make it speak the true intention and meaning of the parties at the time it was made, and where any doubt exists as to its sense and meaning, resort may be had to the circumstances surrounding its execution, for the purpose of ascertaining the subject matter and the standpoint of the parties in relation thereto." (Adams v. Gordon, 265 Ill. 87, 91; Wolf v. Schwill, 209 Ill. 190, 192.) "Where the meaning of a contract is obscure, and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury under proper instructions." (6 R. C. L. p. 562, Sec. 249; 13 Corpus Juris, p. 725, Sec. 997.) We think that the court should have admitted the above mentioned testimony of the commission men offered by defendant, and that the question whether the cantaloupes tendered by defendant to plaintiffs substantially corresponded with those described in the agreement of sale should have been submitted to the jury for their determination under all the evidence admitted and offered. (Hallen v. Le Roy, 10 Booe. 38, affirmed 30 N. Y. 549; Hopkins v. Hitchcock, 108 U. S. 1.,







14 C. B. Rep. N. S. 65.)

Accordingly the judgment of the Municipal Court  
will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Fitch, J., concur.

1880-1881, 1882-1883, 1884-1885

more serious, and to prevent the same

will be revised and the same revised for a new edition.

1886-1887, 1888-1889

1890-1891, 1892-1893, 1894-1895

ACME CASTINGS COMPANY,  
a corporation,

Appellant,

vs.

HOMER STOVE WORKS,  
a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

STATEMENT BY THE COURT. In an action of the first class in assumpsit, after the court over plaintiff's objection had stricken paragraphs 4 and 5 of its amended statement of claim, and after defendant had filed its affidavit of merits, the jury returned a verdict finding the issues against defendant and assessing plaintiff's damages at the sum of \$4,000, and judgment was entered against defendant in that sum on August 29, 1923, and plaintiff appealed. Defendant does not here complain of the judgment.

The action was commenced on November 15, 1918. On March 25, 1918, defendant, an Illinois corporation, entered into a written agreement with E. H. Lavinstein and T. O. Cumming, both of Chicago, Illinois. In the agreement defendant is designated as employer and Lavinstein and Cumming as employees. It is provided in the agreement that it is to become operative immediately upon its execution and is to be in force and effect until April 1, 1921 (about 3 years) and for such a further period as may be necessary "for completion of contracts accepted." Other provisions in the agreement are as follows:

"Duties of Employees--The employees undertake to sell for the employer gray iron castings, machine work, polishing and plating on same when necessary, or wanted, in the city of Chicago, Cook County and such other territory as they may deem advisable to enter for the solicitation of orders, and to devote such time to the employer's business as may be reasonably necessary, but in no case are the employees to be barred from the privilege of doing this or any other kind of work for themselves or any other person or persons.





Employees further undertake to give their best efforts for the collection of accounts and the adjusting of complaints arising from any sale which they may make for the employer, but they are not to be regarded as guarantors of any account, unless specially agreed in writing, and they further agree to secure at a profitable price for the employer on or before thirty days from date of this contract, not less than ten tons per day, such daily minimum to be continuous throughout the period of this contract."

"Duties of Employer--The employer undertakes to assist the employees in obtaining and holding business in every reasonable way, by permitting the employees to be their exclusive representatives in the sale of gray iron castings and to refer all inquiries to the employees for the purpose of making prices and terms, and by filling orders promptly and correctly with castings suitable in composition and finish for the purpose for which they are to be used, all conditions subject to ability to secure material and labor at normal prices."

"Compensation--On the twentieth day of each month the employer agrees to pay to the employees a sum equal to not less than five per cent (5%) of the gross amount of the employer's sales of gray iron castings in the territory covered by this agreement during the calendar month next preceding; this five per cent (5%) commission not to be paid on returned goods, or on freight allowances, if any. This commission of five per cent (5%) is mutually understood to be the base commission to be paid, and where the profits of the employer will be larger than is ordinarily expected it is mutually agreed that on <sup>any</sup> such orders a higher commission may be paid by the employer and accepted by the employees without in any way voiding any part or portion of this agreement. The rate of commission to be limited to seven and one-half (7-1/2) per cent. The employees relinquish all claims for commission on jobs where the accounts for the same are uncollectable and if commission has been paid, said amount will be deducted by employer in future settlements with employees; accounts to be deemed uncollectable when employer and employee have exhausted all ordinary means to collect same or when said accounts are collected by legal process or by a collecting agency."

"Shop Reserve--It is hereby understood and agreed that the employer reserves such shop capacity as is necessary to take care of its above business providing the same does not exceed an average of ten tons per day and it is further understood that said employees are in no manner interested in this department of the employer's business."

"Special Undertakings and Conditions--The employer is to furnish the employees with a carbon copy of each invoice as it is made out, and to keep a sales book showing all sales of gray iron castings, machine work, polishing and plating on same. Same to be entered chronologically. This book to be open to the employees' inspection at all times and to contain a record of all sales made by the employer in the territory covered by this agreement. all





orders and contracts must be expressly or impliedly ratified or approved by the employer before same can be considered a sale by the employees. In case any sale or contract is not so ratified and accepted the rejection thereof must be communicated to the employees within forty eight hours (48) from the receipt thereof in the employer's office, providing the employer has had sufficient time to investigate the financial standing of the proposed purchase and also to figure cost. The employer reserves the right to pass on all prices, terms and conditions of all orders and contracts. The employees reserve the right and privilege of organizing a corporation or co-partnership under any name they may select without voiding this contract so long as either or both of the employees are directly connected with such co-partnership or corporation."

In plaintiff's statement of claim this agreement is set out in full, and it is alleged that on June 11, 1918, Levinstein and Cumming assigned all their right, title and interest therein to plaintiff, which is a corporation organized by them and with which both are directly connected, and that by virtue of said assignment plaintiff became entitled to all the rights, privileges and benefits given them by the agreement. It is further alleged in substance that Levinstein and Cumming, prior to the date of said assignment (June 11, 1918), and plaintiff subsequent thereto, have fully performed all of the obligations and covenants made by Levinstein and Cumming, and that plaintiff is now and at all times has been ready, willing and able to continue to perform the same, but that defendant has failed and refused to perform its obligations and covenants; that after the execution of the agreement Levinstein and Cumming, and plaintiff, secured for and delivered to defendant, and defendant accepted, a large number of orders for gray iron castings, etc., and that, after accepting them, defendant failed in several instances to fill them, or completely fill them, or to pay plaintiff any commissions thereon; that defendant, after accepting certain of said orders, in several instances solicited and accepted further orders from customers in the territory covered by the agreement without referring their inquiries to plaintiff, and filled said further orders but failed to pay plaintiff any commissions thereon;





that during the months of July, August, September and October, 1918, and thereafter, defendant accepted and filled a large number of orders, solicited in said territory and presented by plaintiff, for gray iron castings, etc., but failed and refused to pay plaintiff commissions thereon, which commissions amount to the total sum of \$4,572.06; and that defendant is indebted to plaintiff in said sum and interest thereon.

Plaintiff's statement of claim also contained additional allegations in paragraphs 4 and 5 (stricken by the court, as above stated) as follows:

"4. Said defendant, The Home Stove Works, contrary to its covenants and undertakings, has not assisted the plaintiff, or said E. H. Levinstein and W. S. Cumming, in obtaining and holding business by permitting them to be its exclusive representatives in the sale of gray iron castings and by referring all inquiries to them for the purpose of making prices and terms and by filling orders promptly and correctly with castings suitable in composition and finish for the purpose for which they were to be used, but, on the contrary, has not permitted them to be the exclusive representatives of the defendant in the sale of gray iron castings, has not referred all inquiries to them for the purpose of making prices and terms, but has, in many instances, made prices and terms upon inquiries without consultation with the plaintiff or said E. H. Levinstein and W. S. Cumming, and in many other instances, without the knowledge of said plaintiff or said E. H. Levinstein and W. S. Cumming, and has taken and accepted orders without referring the inquiries preceding said orders to said plaintiff, said E. H. Levinstein or W. S. Cumming, and without paying to them the commissions in said contract agreed upon, has not filled the orders secured by said plaintiff, said E. H. Levinstein and W. S. Cumming promptly but, in many instances, has unnecessarily delayed filling the same; in many other cases, has failed to fill said orders, and, in many cases, has not filled said orders correctly with castings suitable in composition and finish for the purpose for which they were to be used and has failed and refused, and still fails and refuses, to furnish sufficient and adequate space in their foundry, proper and sufficient labor, machinery and equipment and adequate raw material to fill said orders in accordance with said contract, though said defendant, The Home Stove Works, was able to secure material and labor at then normal prices."

"5. Plaintiff further alleges that, contrary to the terms of said agreement, said defendant reserved more shop capacity than was necessary to take care of its stove business, not to exceed an average of ten (10) tons per day, and, in addition thereto, reserved and used a large part of its shop capacity by leasing the same to, to-wit: Cribben & Sexton Co., and, thereby were unable to comply with their

and of 19, 20, 21, and 22. The defendant is charged with the following offenses:

1. The following information is being furnished to you for your information:

1. The Government of the United States, in its efforts to maintain the peace and stability of the world, has been particularly concerned with the situation in the Middle East. The Government has been active in promoting peace and stability in the region, and has been successful in doing so. The Government has been able to bring about a cessation of hostilities between the belligerent parties, and has been able to bring about a return to peace and stability in the region. The Government has been able to bring about a return to peace and stability in the region, and has been able to bring about a return to peace and stability in the region.

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.

undertakings and agreements in said contract contained and to properly, promptly and correctly fill the orders received by it for gray iron castings, and the orders, which the plaintiff and said W. H. Levinstein and W. E. Cumming were able to secure, and said defendant has failed and refused, and does fail and refuse, to accept orders for gray iron castings secured by the plaintiff and said W. H. Levinstein and W. E. Cumming, to fill the same and to furnish sufficient shop capacity to fill the same in accordance with its undertakings and agreements aforesaid; that the plaintiff has been, and is now, able to secure orders for said gray iron castings at profitable market prices and that by reason of the failure of said defendant to perform its undertakings and agreements, as aforesaid, the plaintiff has been and is deprived of the opportunity of earning commissions in accordance with and by virtue of the terms of the aforesaid contract and thereby has been and is deprived of the said commissions to the damage of the plaintiff in the sum of Sixty Thousand Dollars (\$60,000)."

In the affidavit accompanying plaintiff's statement of claim it is stated that there is due it for commissions "earned and accrued" the sum of \$4,572.06, and interest, and that there is also due to it "damages as aforesaid, the amount of which is not liquidated."

Defendant, in its affidavit of merits, alleged in substance that it terminated the written agreement with Levinstein and Cumming on or about April 23, 1918 (one month after its execution); that it did not consent to the said assignment of June 11, 1918, to plaintiff; that while the agreement was in force it fully performed all of its obligations and covenants, and paid Levinstein and Cumming all commissions on all orders for gray iron castings, etc., which they had secured for and delivered to it, and which it accepted and filled; that after the termination of the agreement it was agreed between it and Levinstein and Cumming that it would pay them a commission of 5% upon all orders for gray iron castings secured by them and which it accepted and filled; that in pursuance of this new agreement Levinstein and Cumming, and subsequently plaintiff, secured certain of such orders for it; that it had paid them, and each of them, all commissions on all executed orders; and that it is not indebted to plaintiff in any sum.



[illegible]



MR. JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

In their printed brief and argument here filed, counsel for plaintiff state that the only question involved in this appeal is the correctness of the ruling of the trial court in striking paragraphs 4 and 5 from plaintiff's amended statement of claim. And respective counsel seemingly agree that the correctness of this ruling depends upon the question whether or not the agreement of March 23, 1918, so far as it is executory, is unenforceable for want of mutuality or for want of certainty and definiteness, or both. Counsel for plaintiff state in substance that the court's ruling was based upon the theory that, although plaintiff was entitled to recover under the agreement for any unpaid commissions on orders which either Levinstein and Cumming or plaintiff had delivered to defendant and which it had accepted and filled, plaintiff could not recover any damages caused by defendant's termination of the agreement and its rejection of certain orders delivered to it by plaintiff, and for the reasons that said agreement was lacking in mutuality and was not sufficiently certain or definite. And counsel argue that the court erred (1) because defendant, as employer, was bound by the agreement to exercise good faith in accepting or rejecting orders, and was further bound to pay commissions on all business transacted in the territory mentioned, and that the agreement was mutual, and (2) because the agreement was sufficiently certain and definite. The position of counsel for defendant is that the ruling of the trial court was correct. They first contend that, while the parties to the agreement are designated respectively as "employer" and "employees," the agreement is not strictly one of employment. They argue that it does not give the so-called "employer" such authority or control over the so-called "employees" or such exclusive right to their services as is usual in an employment contract. We think there is merit in the contention. It is

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and therefore we cannot see it as a simple matter of

TABLE 1. *Estimated and observed values of the parameters of the model for the 1997-1998 season*

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and the other two are the same as in the previous case.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

116 The Journal of Law, Economics, & Organization, V16 N1

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We think there is more in the caption. It is

well settled that in determining the character or nature of a contract courts will look to its purpose rather than to the language used by the parties or to the name given it. (Wannio v. Manning & Co., 136 Ill. App. 406, 409; Bendis v. Staver Carriage Co., 174 Ill. App. 589, 594.) However, for convenience, the words "employer" and "employees" can be used to designate the respective parties.

Counsel for defendant also contend that, inasmuch as the agreement did not oblige the employer to accept any orders tendered by the employees or to transact any business in the territory mentioned, and as the employees were to be paid a commission only on such orders as the employer accepted or on the business transacted in said territory, the agreement, as far as it is executory, is unenforceable for lack of mutuality. Special attention is directed to certain provisions of the agreement in the paragraph headed "Special Undertakings and Conditions," as follows: "All orders and contracts must be expressly or impliedly ratified or approved by the employer before same can be considered a sale by the employees. \* \* \* The employer reserves the right to pass on all prices, terms and conditions of all orders and contracts." After consideration of the above quoted provisions and of the entire agreement we agree with the contention, which, we think, is sustained by decided cases. (Goodrich v. Hartwick, 43 Ill. 445; Joliet Bottling Co. v. Joliet Citizens Brewery Co., 254 Ill. 215, 218; Oakland Motor Car Co. v. Indiana Automobile Co., 211 Fed. Rep. 499, 504; Tenby v. Trunt Pottery Co., 229 Ill. 540, 543.) The fact that there was a partial performance under the agreement does not cure its lack of mutuality. (Gold Blasi Transportation Co. v. Kansas City Belt & Bus Co., 114 Fed. Rep. 77, 81.)

Counsel for defendant call attention to several provisions of the agreement which, they contend, show its lack of







certainty and definiteness. While we think it is uncertain and indefinite in some important particulars, in view of our above holding we deem it unnecessary to decide that the agreement, so far as it is executory, is unenforceable for this reason.

In our opinion the Municipal Court did not err in striking paragraphs 4 and 5 from plaintiff's statement of claim, and we think the judgment appealed from should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

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FREDERICK L. WILK, trustee  
under the last will of  
John H. Sanborn, deceased,  
Appellee.

vs.

JOSEPH W. SANBORN,  
Appellee.

and

IDA M. SANBORN,  
Appellant.

APPEAL FROM

CIRCUIT COURT OF  
COOK COUNTY.

STATEMENT BY THE COURT: By this appeal Ida M. Sanborn seeks to reverse a decree of the Circuit Court of Cook County, entered June 30, 1922, and based upon a bill of interpleader filed September 8, 1920, by Frederick L. Wilk, trustee under the last will of John H. Sanborn, deceased, who departed this life in October, 1917, at the age of about eighty-three years.

Complainant alleges in his bill that in said will he was nominated as executor and trustee; that the will was admitted to probate in the Probate Court of Cook County; that he qualified as executor, performed all duties and obligations, paid certain legacies and all claims against the estate, and was duly discharged as executor; that as trustee he has reduced all of the property to cash and has on hand a cash balance of \$6,335.45 (subject to his fee as trustee \$150, that of his attorney \$600, and costs and fees which will accrue in this proceeding), which said sum was, under the provisions of a certain paragraph of the will, to be divided equally between the defendants, Joseph W. Sanborn and Ida M. Sanborn, son and daughter respectively of the deceased; that he has always been ready to pay said sum, less the deductions, to the person or persons lawfully entitled thereto and offers to bring the same into court; that Joseph W. Sanborn claims all of said sum, by virtue of the provisions of the will and by virtue

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continued on next page

1960-1961 (1961) - 100% removal of alien

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first group of people who are likely to be affected by the proposed project are the local residents who live in the vicinity of the project site. These residents may be affected by the project in a number of ways, including increased traffic, noise, and air pollution. It is important to identify these potential impacts and develop measures to mitigate them.

... ..

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1960. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1960. This has led to a concentration of the population in urban areas, which has had a number of important consequences for the development of the United States.

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...with the ... ..

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I don't understand all the wilderness regulations for the area.

the following table, the results of the analysis are given.

10. *Journal of the American Statistical Association*, 1991, 86, 103-110.

*The Journal of Law, Economics, & Organization*, V16 N1, Spring 2000, pp. 1-79  
© Society for Law and Economic Analysis, Inc.

TABLE 1. *Mean (SD) values for the 1000 and 2000 m runs*



of a quitclaim deed, dated September 9, 1918, executed by Ida M. Sanborn and subsequently delivered to Joseph W. Sanborn, and conveying to him all her interest in a certain piece of real estate in Cook County, which has since been sold by complainant, as trustee of said estate, and the proceeds therefrom make up the sum now in his hands as trustee; that Ida M. Sanborn claims a one-half interest in said sum by virtue of the provisions of the will; and that complainant does not file his bill at the request of either of the defendants, has not colluded with either, is not in any way indemnified by either, but presents the bill because he seeks to avoid being molested and harassed on account of the dispute existing between the defendants.

Joseph W. Sanborn, in his answer, practically admits all of the allegations of the bill. He claims that he is entitled to the entire sum, less the deductions. He alleges in substance that at the time of the death of his father in 1917 he was a lieutenant in the United States army and stationed at Camp Logan in the State of Texas; that he there received a copy of the will and subsequently retained a Chicago attorney to represent him; that after investigations made by said attorney and upon his advice, and because of the terms of the will and because of the fact that shortly prior to said death the decedent had conveyed certain other real estate in Chicago to said Ida M. Sanborn, he prepared to contest the validity of said conveyance; that during said preparations a settlement was reached as to the matters in issue between him and Ida M. Sanborn, whereby she, in consideration of his agreeing not to contest said will or said conveyance, agreed to relinquish all interest in the property of said estate which she might be entitled to under said will, and executed and delivered said quitclaim deed, which deed remained in the hands of one E. W. Stout, attorney for complainant as trustee until after the time for filing proceedings to contest said will had



expired; that after this defendant's return from service in the army in June, 1919, and after the time for filing proceedings to contest said will had expired, said Stout delivered to this defendant said deed and the same was shortly thereafter recorded in the Recorder's office of Cook County; that this defendant, believing himself by virtue of the will and said quitclaim deed to be the sole owner of said piece of real estate or the proceeds thereof when sold, expended much money and time, from June, 1919 to June, 1920, in putting the buildings thereon in proper repair for rental or sale; that he secured a buyer to whom complainant, acting as trustee under said will, afterwards sold the land and buildings; that this defendant also advanced the sum of \$4,000 to complainant to satisfy five legacies of \$800 each mentioned in said will and which were a charge upon said real estate, which said sum was later returned to him; and that after the sale of said real estate he was informed by complainant that before complainant would pay to him said sum of \$5,335.45, less the deductions, complainant would require Ida M. Sanborn to execute an assignment to this defendant of all her right and interest in and to said estate of John M. Sanborn, deceased, but that Ida M. Sanborn refused and still refuses to execute the same.

Ida M. Sanborn, in her amended answer, also practically admits all of the allegations of the bill. She claims she is entitled to one-half of said sum, less said deductions, in complainant's hands. She alleges in substance that Joseph W. Sanborn, well knowing her great love for her father and that she was suffering from a heart affection which obliged her to avoid all excitement, threatened her with a contest of said will unless she would surrender her claim to said piece of real estate or to the proceeds from the sale thereof; that, if said R. M. Stout delivered said quitclaim deed to said real estate which she had executed, "it was not with her con-



explained; that after this telephone conversation from the office in the  
 room in June, 1915, and after the time for filing proceedings to  
 contest said will had expired, said contest delivered in this  
 defendant said said and the same was promptly thereafter received  
 in the District's office of Cook County; that this defendant,  
 believing himself by virtue of the will and said defendant's deed  
 to be the sole owner of said piece of real estate on the premises  
 thereof then said, expended much money and time, from June, 1915  
 to June, 1916, in getting the building thereon in proper repair  
 for rental or sale; that he received a letter to show defendant  
 acting as executor named said will, defendant said the land and  
 building; that this defendant also received the sum of \$1,000 in  
 complaint to said's five parcels of 1900 soon mentioned in  
 said will and which were a charge upon said real estate, which said  
 sum was later returned to him; and that after the sale of said real  
 estate he was informed by complainant that before complainant would  
 pay to him said sum of \$1,000.00, first the defendant, complainant  
 would require the E. A. Brown to execute an affidavit to the  
 defendant of all her rights and interests in said real estate of  
 John E. Brown, deceased, but that the E. A. Brown refused and still  
 refused to execute the same.

The E. A. Brown, in her answer, also practically  
 admits all of the allegations of the will. She claims she is  
 entitled to one-half of said sum, said said defendant, in con-  
 sideration of her services, and claims to represent said E. A. Brown,  
 will requiring her great care for her father and that she was entitled  
 and from a moral obligation which existed between her and said defendant,  
 mentioned her with a contract of said will which she would not  
 pay claim to said piece of real estate or to the proceeds from the  
 sale thereof; that, it said E. A. Brown, defendant said defendant said  
 to said said estate which she had executed, was not with her con-



sent or in accordance with her understanding of the settlement made between her and her said brother;" that if any money was spent by her brother in repairing the buildings on said premises it came out of the rents; that she never agreed to make an assignment of her interest in her father's estate to her brother, or to anyone for him, except as hereinafter stated; that both her father and mother lived to an advanced age and long after either could be self-supporting; that her mother died three years before her father; that besides paying for their funeral expenses she paid out of her own funds, in order to make their declining years comfortable, more than \$5,578 for them, and paid for their benefit in all the sum of \$6,900; that it was because of these payments that her father, before his death, deeded to her said other piece of real estate mentioned in her brother's answer; that she signed said quitclaim deed "only as one step in the settlement with her brother and did so without any intention of waiving her rights in her father's estate;" that she did agree that "if her brother would \* \* not bring any action that might reflect upon her father, she would waive all interest in his estate after her said advances were repaid her;" that she signed said quitclaim deed with this understanding; that "if anyone delivered said deed, without at the same time receiving a proper written statement as to the true understanding, viz., that after she was reimbursed for said advances she would surrender her claim to any balance of the estate left, such person acted without her authority, and without her knowledge;" that said quitclaim deed, when "taken alone and without the further terms of the agreement," was given without consideration and should be decreed to be of no force and effect; and that "an accounting should be had as to the amount advanced by her" and the balance in complainant's hands "should be divided as equity would suggest."

The cause was referred to a master in chancery to take testimony and report his conclusions of law and fact. His report

...of its substance with her mother-in-law of the settlement made  
between her and her father-in-law; that if any money was spent by  
her mother in paying the mortgage on said premises it was not  
at the time; that she never agreed to make an assignment of her  
interest in her father's estate to her mother, or to anyone for him,  
except as hereinafter stated; that both her father and mother lived  
to an advanced age and both died of their own free will and without  
that her mother died three years before her father; that neither was  
the for their father's estate and paid out of her own income, in order  
to make their children's needs comfortable, more than \$5,000 for them,  
and paid for their benefit in all the sum of \$5,000; that it was the  
custom of these payments that her father, before his death, made in  
her said other place of their estate mentioned in her father's will;  
that she signed said will which was "only as she did in the will"  
made with her father and did so without any intention of giving her  
rights in her father's estate; that she did signed the will of her father  
would \* \* \* not bring any action that might result upon her father, she  
would never be interested in his estate after her said father's  
death; that she signed said will which was a will under  
standing; that the same delivered said deed, at the time of the same  
time received a proper written statement as to the true understanding  
of it. That after she was released for said statement she would never  
say her claim is now witness of the estate left, upon which stated  
claiming her authority, and without her knowledge; that she is satisfied  
that, when "taken along and along the father's house of the same"  
ment." "You given without consideration and should be deemed to be of  
no force and effect; and that "an acknowledgment should be set on to the  
amount advanced by her" and the balance in compensation's hands "should  
be divided as equity would suggest."

The court was referred to a master in chancery to take  
testimony and report the conclusions of law and facts. His report

was filed July 21, 1921. He found in substance, among other findings, that the allegations of complainant's bill were substantially correct; that on September 9, 1918, Ida M. Sanborn executed and acknowledged said quitclaim deed, conveying to Joseph W. Sanborn, for the consideration of \$10 and other valuable considerations, all her interest in a certain piece of real estate in Oak Park, Cook County, Illinois, known as the Chicago Avenue property; that said deed was duly recorded on June 3, 1919; that Ida M. Sanborn signed the deed of her own volition and without any undue influence on the part of anyone; that on September 9, 1918, the deed was delivered to a custodian in whose possession it remained until shortly prior to the date of its recording, when it was delivered to Joseph W. Sanborn after his return to Chicago from military service; that about January, 1918, Ida M. Sanborn learned that her brother had retained an attorney to commence proceedings to set aside the will of the father and also a certain deed of his, executed about two years before his death, conveying to her as a gift a certain other piece of real estate in Cook County; that thereafter she had various conversations with said Stout, attorney for complainant, and some correspondence passed between them; that she was informed that said proceedings would be commenced unless she would agree to quitclaim all interest which she had by virtue of said will in said Chicago Avenue property; that she thereafter executed and delivered said quitclaim deed with the understanding that the same would not be delivered to her brother until the time had expired within which proceedings could be begun to set aside the will, and the deed was not delivered to him until said expiration; that under the terms of the will the Chicago Avenue property was subject to the payment of bequests of \$800 each to five grandchildren of the deceased; that after said deed was recorded Joseph W. Sanborn made repairs on the buildings on said property, and paid complainant as trustee under said will the sum of \$4,000, with which said bequests were paid, and







which sum subsequently was returned without interest to Joseph W. Sanborn by complainant; that complainant decided that before making the final distribution of said trust estate it would be advisable or necessary for Ida M. Sanborn to execute to her brother an assignment of her interest in said estate and also have the brother execute to her a certain release; that after much negotiation between said Stout and Ida M. Sanborn such an assignment and release were drafted during June, 1930, but said Ida M. Sanborn finally refused to execute said assignment, and the release which had been executed by Joseph W. Sanborn was not delivered; that said Chicago Avenue property was finally sold by the complainant for enough to pay all legacies and leave said balance of \$5,355.45 in complainant's hands as trustee; that the unsuccessful efforts of said Stout to secure the signature of Ida M. Sanborn to said draft of assignment were made at complainant's request, because complainant was of the opinion at the time that such assignment was necessary to protect him as trustee in making distribution of said balance in accordance with the intention of Ida M. Sanborn as expressed by her in the giving of said quitclaim deed; that prior to the execution of said deed she told said Stout that she had paid the funeral expenses of her father and mother and had made certain payments for her father in his lifetime, that Stout then advised her to file claims therefor against her father's estate in the Probate Court, but that she then replied that she did not care to do so, and that she in fact never filed such claims; that according to her own testimony she had not considered, up to the time of her father's death, any money which she had paid for the benefit of her parents as advances; that in conversations with said Stout relative to the proposed assignment, which took place some time after the execution of the quitclaim deed, she stated she would execute the assignment, if she was reimbursed for the moneys which she had advanced to her father;



and that her testimony shows that she now claims that she had made advances to the total amount of \$9,876.49, an amount greater than the total sum now in the hands of complainant for distribution.

From all the evidence introduced the master reached the following conclusions in substance: That Ida M. Sanborn was reimbursed by her father during his lifetime for a large portion of the moneys which she claims to have advanced and paid out for him; that, in conveying by said quitclaim deed to her brother all interest which she had in the Chicago avenue property, she thereby intended to and did transfer to him all interest which she had under said will in the residuary estate, then in the possession of complainant, as trustee; that such conveyance and transfer was made in consideration of her brother abandoning his proposed action to set aside his father's will, and to set aside the deed of the father to Ida M. Sanborn, conveying said other piece of real estate, and which was executed and delivered without any valuable consideration; that Ida M. Sanborn, by failing to file any claims against her father's estate in the Probate Court for advances made by her, is precluded from setting up said advances in the present proceeding; that the validity and effect of said quitclaim deed are the only issues in the case; that she is not entitled to have an accounting in this proceeding, as to the moneys paid out by her for her father and the moneys received from him during his lifetime; that her claim for such advances was first made as a condition precedent to her executing said proposed assignment; that its execution was unnecessary to transfer her interest in the trust estate because Joseph M. Sanborn had already acquired that interest by virtue of said quitclaim deed; that complainant, as trustee, having subsequently sold said Chicago avenue property, said deed, in equity, operated as an assignment of the proceeds of said sale; that complainant was mistaken in deeming it necessary, in order to protect him as trustee, to have Ida M. Sanborn execute and deliver said proposed assignment; that the equities of the case



and that the testimony of the witness that the defendant had made advances to the victim amounting to \$5,000.00, as shown by the evidence, was not in the hands of the defendant for the purpose of the same.

From all the evidence introduced the jury reached the

following conclusions in substance: That the defendant was re-

informed by the victim that the defendant was a large portion of

the money which was given to him by the defendant and that the

defendant, in consequence of his testimony, had been informed of the

fact that the defendant was a large portion of the money which was

given to him by the defendant and that the defendant was informed of

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given to him by the defendant and that the defendant was informed of



are with Joseph W. Sanborn; and that he is the owner, by virtue of said quitclaim deed, of the balance of the moneys in complainant's hands, subject to certain proper fees and expenses mentioned.

The master recommended that a decree be entered in accordance with his findings and conclusions, and further recommended the taxing of certain enumerated costs against Ida M. Sanborn. More than ninety objections to this report were filed by her solicitor, which objections were overruled and which thereafter were ordered to stand as exceptions before the court.

While the cause was pending before the court on said exceptions, Ida M. Sanborn, on March 14, 1922, filed a cross-bill in which she made substantially the same allegations as are contained in her amended answer, and also alleged that said quitclaim deed was obtained from her by fraud and deception. She prayed that the deed might be set aside as null and void and as a fraud upon her, and that the trustee be ordered to forthwith pay to her one-half of the balance of the moneys in his hands, less proper deductions. Joseph W. Sanborn filed an answer denying all the material allegations of the cross-bill. Complainant also filed an answer demanding strict proof of the allegations contained in the cross-bill. No additional evidence was offered before the master or before the court in support of its allegations.

In the decree appealed from the court overruled all of the exceptions of Ida M. Sanborn to the master's report, confirmed the report in all respects, made many findings substantially the same as those of the master, found that the bill of interpleader was properly filed, and that the total trust estate in the hands of the complainant amounted to \$5,642.12, including accrued interest. The court decreed that complainant retain the sum of \$863.20 for costs and certain fees and pay to Joseph W. Sanborn the sum of \$4,778.92, and that Ida M. Sanborn pay to Joseph W.

etc with Joseph A. Lombardi; and that he is the owner, by virtue of said certificate, of the balance of the money in Lombardi's bank, subject to certain proper fees and expenses mentioned.

The master recommended that a decree be entered in accordance with his findings and conclusions, and further recommended the award of certain monetary costs against the defendant. Some other minor suggestions in this report were filed by her solicitor, which suggestions were examined and which those that were ordered to stand as exceptions before the court.

While the master was pending before the court on this exception, the U. S. Marshal, on March 11, 1937, filed a counter-bill in which the master substantiated the same allegations as are contained in her amended answer, and also alleged that a writ of habeas corpus was obtained from her by force and coercion. He stated that the facts might be set aside as null and void and as a fraud upon her, and that the master be ordered to reimburse her for her one-half of the balance of the money in the bank, less proper deductions. Joseph A. Lombardi filed an answer thereto on the master's allegations of the counter-bill. Lombardi also filed an answer substantiating each of the allegations contained in the counter-bill. No additional evidence was offered before the master or before the court in support of the allegations.

In the decree appealed from the court overruled all of the exceptions of the U. S. Marshal to the master's report, and entered the report in full, with many findings substantially in favor of the master, found that the bill of intervention was properly filed, and that the fact stated in the counter-bill was substantiated.

The complaint numbered as 8,818.15, in which the master's interest. The court found that Lombardi was the owner of the property and certain fees and pay to Joseph A. Lombardi the sum of \$4,712.50, and to the U. S. Marshal the sum of \$1,000.00.

Sanborn \$14.20 for court costs, \$300.50 for reporter's charges and \$222 for master's fees, all taxed as costs, and that in default of such payment execution may issue therefor.

regarding the various other matters, which have been discussed in the  
 the past, and which have been discussed in the past, and which have been discussed in the past,  
 referred to and which have been discussed in the past, and which have been discussed in the past.



MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

After a review of the findings and conclusions of the master, of the evidence introduced before him, and of the decree, we are of the opinion that the decree is in substantial accord with equitable principles and should be affirmed. Counsel for Ida M. Sanborn, referring to the quitclaim deed of September 9, 1918, says in his reply brief here filed: "There can be no doubt that such a deed would be construed to be an assignment of the interest of Ida M. Sanborn, and would be enforced in equity, if it had been made upon a valid and valuable consideration and if it were untainted by fraud. But it should not be enforced because no consideration was given for it, and it was procured by acts fraudulent in the extreme and against public policy." We agree with counsel that the deed, if supported by a valid and sufficient consideration and if its procurement is untainted by fraud, will be construed and enforced in equity as a valid assignment to Joseph W. Sanborn of the interest of Ida M. Sanborn in the moneys in complainant's hands, as trustee under the will of John H. Sanborn, deceased, which moneys were obtained by the subsequent sale of the real estate in question by the trustee, acting under the provisions of said will. (Shepherd v. Clark, 38 Ill. App. 66, 70; Hidaway v. Underwood, 67 Ill. 419, 428; Thornton v. Lough, 397 Ill. 204, 211.) And, in our opinion, no further assignment by Ida M. Sanborn was necessary to be made after the sale of said real estate was made by complainant as trustee under said will. (3 Pomeroy's Eq. Jur. Par. 1288.) But we cannot agree with counsel that said quitclaim deed did not have a valid and sufficient consideration to support it. The court in its decree, following the master's report, found that the "said conveyance and transfer was made in consideration of Joseph W. Sanborn abandoning his proposed action to set aside the will of John H. Sanborn, deceased, and to set aside the



deed of John H. Sanborn to said Ida M. Sanborn, executed and delivered without valuable consideration." We think this finding is amply supported by the evidence, and that such forbearance on the part of Joseph H. Sanborn constituted a sufficient and valid consideration. (Sheppey v. Stevens, 185 Fed. Rep. 147; Hellers v. Parry, 191 Mich. 619; Brandenburg v. Fuller, 206 Mo. 534.) And we cannot say, after a careful review of the testimony, that the quitclaim deed was procured by any fraud practiced upon Ida F. Sanborn or that its procurement is against public policy, as urged. The court in its decree, following the master's report, found "from the testimony of the said Ida M. Sanborn that she signed said deed of her own volition without any undue influence on the part of anyone."

And we are of the opinion that the finding or conclusion of the court, following that of the master, to the effect that Ida M. Sanborn was not entitled to have an accounting in the present proceeding as to moneys claimed to have been paid out by her for her father and as to moneys received by her from him during his lifetime, was correct. (Lyons v. Lyons, 231 Ill. 367, 374; Calvin v. City of Chicago, 260 Ill. 27, 57.)

For the reasons indicated the decree of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.





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JOHN M. KLONOWSKI, Administrator  
of the Estate of Elizabeth  
Frankovick, Deceased,  
Appellee,

vs.

GEORGE C. K. SCHMIDT,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 6, 1913, a judgment was entered in a tort action in the Circuit Court of Cook County for \$7,000 in favor of John M. Klonowski, as administrator of the estate of Elizabeth Frankovick, deceased, and against George C. K. Schmidt, executor and trustee, "to be paid in due course of administration." An appeal was taken by said Schmidt to this appellate court resulting in the judgment being affirmed on March 18, 1920, (217 Ill. App. 180). A petition for a writ of certiorari was denied by the Supreme Court. Thereafter, on November 6, 1920, Klonowski, as administrator, filed an intervening petition in certain consolidated causes (entitled Fahl v. Schmidt and then pending on the chancery side of said Circuit Court and involving an accounting between said Schmidt, as the surviving executor and trustee of the estate of Jasper S. Schmidt, deceased, and the beneficiaries) praying for an order directing that Schmidt, as executor and trustee, forthwith pay to petitioner the amount of said judgment. Certain interested parties answered the petition claiming in substance that said trust estate was not liable for the amount of the judgment and the liability, if any, was that of said George C. K. Schmidt personally and not as trustee. After a hearing on the petition the Circuit Court entered a decree July 16, 1921, finding that petitioner had a first lien, subject only to the

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SECRET

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Source: *Journal of the American Statistical Association*, 92(439), 1031-1042.

that a 100% increase in the number of people who are

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THE UNITED STATES OF AMERICA  
DO hereby certify that  
[Name] is a citizen of the United States of America  
and that [Name] is a resident of the State of [State]  
and that [Name] is a member of the [Organization]  
and that [Name] is a [Position]

[illegible]

costs of administration, on all the real and personal estate in the possession of said Schmidt as executor and trustee, to secure the payment of said judgment, and ordering him, as executor and trustee, to pay "in due course of administration" the amount of said judgment, interest and costs. From this decree an appeal was taken to this appellate court and, on June 27, 1922, this court, for reasons stated in the opinion, reversed the decree and remanded the cause with directions to dismiss the petition of Klenowski, administrator, for want of equity. (Wahl v. Schmidt, 225 Ill. App. 331). In the opinion this court stated (p. 313) "The remedy of appellee under the circumstances is, as it seems to us, to have the \$7,000 judgment corrected for error in form so as to allow the issuance of an execution against Schmidt personally." On July 25, 1922, Klenowski, as administrator, appeared in said Circuit court and made a motion, supported by affidavit, that said judgment of July 5, 1918, be amended by striking out from the judgment order the words "to be paid in due course of administration," and by inserting in lieu thereof the following words: "and that the plaintiff herein have execution against said George C. E. Schmidt according to law." Schmidt obtained leave to file, and filed, an amended answer to the motion, setting up various objections. The court, however, granted the motion and entered an order amending said judgment in manner and form as prayed. Schmidt, by this appeal, seeks to reverse that order.

After the transcript of the record in the present case had been filed, Schmidt applied for and was granted a writ of certiorari by the Supreme Court to review said judgment of this appellate court in Wahl v. Schmidt. On February 12, 1923, the Supreme Court filed an opinion (Case No. 15011, ~~XXXXXXX~~ reported in 307 Ill. 331) ~~XXXXXXX~~ and ordered that the said judgment of this appellate court be affirmed. In its opinion, ~~XXXXXXX~~ it is said (p. 340):







"The cases in which a trust estate has been charged with liability for either the contract or the tort of the trustee have been in equity, except in those States where the distinction between actions at law and suits in equity has been abolished and but one form of action exists. An action against a trustee in his representative capacity is unknown to a court of law, for the law takes no cognizance of the trust relation or the trust estate. The trust estate can make no contract and can commit no tort. If the trustee binds himself for the benefit of the trust estate the contract is his personal contract though he describes himself as trustee. He is liable to an action at law for its breach, and a personal judgment is the only judgment which can be rendered against him. (Duvall v. Craig, 2 Wheat. 45; Taylor v. Mayo, 110 U. S. 330). In the action brought by the administrator in this case the defendants were described as surviving executors and trustees of the estate of Jasper S. Schmidt, and the judgment against them was directed to be paid in due course of administration. The designation of the defendants as trustees in the pleadings was merely descriptive of the persons. (Duvall v. Craig, *supra*; Taylor v. Mayo, *supra*). The use of those words may be descriptive either of the person sued or of the capacity in which he is sued, and whether they are to be regarded as used in the one sense or the other must be determined from the allegations of the declaration. If the declaration states a cause of action against the defendant personally, the words must be held descriptive of the person, for they can have no other use."

After mentioning certain decisions in other jurisdictions the Supreme Court further said:(p. 342):

"From these decisions it appears that the court may look at the whole record to determine whether or not the judgment against an executor or administrator is a personal judgment against the executor or administrator or a judgment to be satisfied only from the goods of the trust estate. Looking at the record in the case of Alenowski v. Schmidt, it is apparent that the only cause of action stated is a cause of action against the defendant personally. The court of law was without jurisdiction to entertain the action or to render the judgment unless the action was against the defendant personally. It does not appear that there was any demurrer to the declaration. If there was, the defendant afterwards filed pleas and thereby waived the demurrer. No claim was made either in the Circuit court or in the Appellate court that the trust estate was not liable and that if there was any liability it was that of the trustee personally. If such claim had been made no doubt it would have been sustained by the trial court, and if it had been made in the Appellate court the error would have been corrected."

The present case was orally argued before this appellate court on March 2, 1923. During the argument counsel for Schmidt stated that Schmidt had applied for a rehearing in the Supreme Court in said cause, No. 19011, and conceded that if such rehearing was



denied said opinion was decisive of the present appeal and that nothing remained but for this appellate court to affirm the order of the Circuit court entered July 20, 1928, wherein the original judgment order of July 6, 1918, was amended in manner and form as above mentioned. Such rehearing was denied by the Supreme Court on April 6th, 1923. During said oral argument counsel for Alonswail, as administrator, called attention to certain annotations following the case of Jones v. Johnson (178 Pac. Rep. 934) and contained in volume 21 of the American Law Reports, recently published, where on page 918 it is said: "In general, it may be said that there exists in the courts the right to amend a judgment rendered against the defendant in his individual capacity when it should have been against the estate, or vice versa, whenever a reference to the cause of the action and the pleadings would support the judgment as amended."

In our opinion the Circuit Court did not err in entering the order amending said judgment of July 6, 1918, and such order is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.





335 - 28170

HENRY HATTENDORF.

Appellee.

vs.

JOHN KUYKIN.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 31, 1922, plaintiff commenced a forcible detainer proceeding against defendant to obtain possession of a store at No. 6759 South Halsted street, Chicago. Under the third sub-section of section 48 of the Municipal Court Act he united with his claim for possession a claim for rent due for the premises, amounting to \$375, for the months of March, April, May, June and July, 1922. On the trial, which was before the court without a jury, plaintiff and defendant testified and certain documentary evidence was introduced. The court found defendant guilty of unlawfully withholding the possession of the premises from plaintiff, and, as to the claim for rent, found the issue in favor of plaintiff and assessed his damages at the sum of \$375. On August 22, 1922, judgment was entered against defendant on the finding and he appealed.

The following facts in substance are disclosed from the evidence: Plaintiff in the year 1921 was the owner of the premises in question and had leased the store to a tenant where drinks claimed to be "soft" were sold. A proceeding in equity, entitled "United States of America v. J. J. Goodruff, 6759 South Halsted street, Chicago, and Henry Hattendorf, 7012 South Morgan street, Chicago," was commenced in February, 1921, in the U. S. District Court, for the Northern District of Illinois, Eastern division. Service was had, and on September 28, 1921, the U. S.

1. The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the United States National Bank, for the year ending June 30, 1901.

District Court entered an order that, on account of the failure of the defendants to appear within the time required, the bill be taken as confessed, etc., and further ordered that "said defendant shall not use or occupy the premises described in the bill of complaint until otherwise ordered by the court." On March 11, 1922, defendant, being desirous of purchasing the "soft drink parlor" which had been operated in said store, called on plaintiff and asked him if he (plaintiff) had any objections if defendant bought the fixtures and business there. Plaintiff, knowing of the issuance of said interlocutory injunctive order but not mentioning the fact, replied that he had no objections. Nothing was said at the time as to plaintiff giving any lease of the store to defendant, or how long defendant might occupy it, or what monthly rental defendant should pay. On the same day defendant went to the store, purchased the fixtures and business of the tenant, took possession of the store and commenced operating the business. On March 15, 1922, two Federal prohibition officers called and informed defendant of the existence of said injunctive order, prohibiting the use or occupancy of the premises until otherwise ordered by the court. Defendant immediately locked the store, leaving the purchased fixtures therein, and ceased operating the business. On the same day he informed plaintiff of the facts. The testimony of the parties as to what occurred at this and subsequent interviews is conflicting. According to plaintiff's testimony defendant verbally agreed that he would be responsible for the rent of the store from March 1st, and would take steps to bring about, if possible, a dissolution of the injunctive order. Defendant testified in substance that he made no such agreement; that he informed plaintiff that he would not pay any rent, or any sum for the use and occupation of the store, unless and until the injunctive order was dissolved, or so modified as to allow him to continue to



The first thing I noticed when I stepped out of the car was  
 the silence. It was a strange silence, not the kind of  
 quiet that comes from a still night, but a heavy, oppressive  
 silence that seemed to be waiting for something. I looked  
 around me, but there was nothing. The car was empty, the  
 engine was off, and the only sound was the hum of the  
 air conditioning. I sat there for a moment, trying to  
 figure out what was going on. Then I remembered the  
 phone call I had received the night before. It was a  
 woman's voice, soft and sweet, but with a hint of  
 mystery. She had said that she was waiting for me, and  
 that she was in a place called "The Garden". I had  
 been curious about it ever since, and now I was here.  
 I got out of the car and looked around. There was a  
 large, ornate building in the distance, with many windows  
 and a tall chimney. It looked like a mansion or a palace.  
 I walked towards it, feeling a little nervous. The  
 path was made of cobblestones and was flanked by  
 hedges. There were some flowers in bloom, and the  
 air smelled like a garden. I continued walking until  
 I reached the building. The door was open, and I  
 stepped inside. A woman was sitting in a large, comfortable  
 chair. She was wearing a long, flowing dress and had  
 a gentle smile on her face. She stood up and greeted  
 me. "Welcome to The Garden," she said. "I'm so glad  
 you're here." I followed her to a large, ornate room  
 with many windows. She pointed to a chair and said, "Sit  
 down. I'll get you some tea." I sat down and waited.  
 After a few minutes, she returned with a tray of tea.  
 She set it on a small table next to me and said, "I  
 hope you like it. I made it just the way you like it."  
 I took a sip of the tea and it was perfect. I looked  
 at the woman and said, "Thank you. This is very nice."  
 She smiled and said, "I'm glad you like it. Now, tell  
 me about your trip. How was it?" I told her everything  
 I had seen and done. She listened intently and nodded  
 her head. When I finished, she said, "That sounds like  
 a very interesting trip. I'm glad you had a good time."  
 I smiled and said, "Yes, it was. Thank you for having  
 me here." She stood up and said, "I'll see you again  
 soon. Until then, take care." I walked back to the car  
 and got in. I looked back at the building one more  
 time before I drove away. It was a strange experience,  
 but I was glad I had it.



run the "soft drink parlor" therein; that he expected plaintiff to take the necessary steps; and that there was some talk as to plaintiff giving defendant a two years' lease of the store, in case said injunctive order was dissolved or so modified. Plaintiff afterwards refused to take any steps to dissolve or modify said order, and on July 10, 1924, the U. S. District Court entered a final decree in which it was adjudged that said store was on February 10, 1921, a common and public nuisance and ordered that "all intoxicating liquor heretofore seized on said premises be destroyed," and further ordered that Henry Mattendorf (plaintiff in the present case) his agents, etc., and any persons claiming through or under him, be enjoined from manufacturing, selling or storing on the premises intoxicating liquors, and that "said real estate and premises \* \* shall not be occupied or used for one year subsequent to the date of this decree." It was further ordered that Mattendorf, or any person claiming under him, might petition the court for a permit to open and occupy the premises upon the petitioner giving a certain bond under certain named conditions. At the time of the entry of this decree the fixtures, which defendant had purchased from plaintiff's former tenant, still remained in the store. During July, 1924, plaintiff demanded of defendant rent for the store for the five months ending July 31, 1924, at the rate of \$75.00 per month. Defendant refused to comply with the demand and claimed that he had had actual possession of the store for only four days, ending March 15, 1924. Plaintiff demanded that defendant surrender the keys to the store, which demand was refused, and at the time of the commencement of this action defendant still had the keys in his possession, and his said fixtures were still in the store.

Under the somewhat peculiar facts we are of the opinion that that portion of the judgment appealed from, wherein plaintiff was adjudged entitled to recover from defendant the possession

was the "first time" (1911) that he signed a statement  
 to take the necessary steps; and that there was some talk in the  
 plainly giving testimony a few years' later, in  
 case said international order was dissolved or so modified. This  
 this statement referred to this way, as to dissolve or modify  
 said order, and on July 10, 1911, the U. S. Secretary of State  
 a final decree in which it was stipulated that there was an  
 February 10, 1911, a decree was signed and signed this  
 "All international order heretofore existing on this continent in  
 testimony," and this decree was signed by Secretary of State  
 in the present case, his power, etc., and was signed by  
 through or under him, he signed the same, stating, saying or  
 stating on the premises heretofore signed, and that this was  
 states and provinces? "shall not be regarded as such for any  
 purposes in the date of this decree." It was further stated  
 this statement, at the same time, signed by the  
 the same, but a decree to take and modify the premises upon the  
 testimony giving a certain number of years' notice.  
 at the time of the entry of this decree, the statement, which dated  
 and the present time, signed by the same, will remain in  
 the same. "This decree, 1911, signed by the same, and  
 the same for the time being signed July 10, 1911, at the time  
 at 1911, was signed. Secretary of State, to make this the same  
 and signed and he had not signed a statement of the same for any  
 last year, signed July 10, 1911, signed by the same, and  
 surrounded the fact in the same, which signed and signed, and at  
 the time of the statement of this decree, signed July 10, 1911, and  
 was in the statement, and the same signed July 10, 1911, and  
 signed.

When the signed decree was on the part of the signed  
 and the signed of the signed signed, which signed  
 and the signed signed to make the signed the signed

of the premises in question, should be affirmed, but that that portion of the judgment, wherein it was adjudged that plaintiff recover from defendant damages to the extent of \$375 should be reversed. We fail to find in the present record any evidence of any express agreement on the part of defendant to pay any stipulated monthly rental for the store, or any evidence showing what was the reasonable rental value per month therefor during said five months. Furthermore, we think that the action of plaintiff, on March 11, 1934, in attempting to create the relation of landlord and tenant between himself and defendant when he knew of the existence of said injunctive order, was illegal, and that, if any such relation was then created by any implied contract, such contract is one which the courts will refuse to enforce on the ground of public policy. The fact that defendant was a party to such illegal contract will not prevent defendant from interposing the defense of illegality. (Fields v. Brown, 136 Ill. 111, 115.)

For the reasons indicated the judgment of the Municipal Court that plaintiff recover from defendant the possession of the premises is affirmed, but that portion of the judgment, wherein it is adjudged that plaintiff have and recover of and from defendant the sum of \$375 and costs, is reversed. And it is further ordered that each party pay his own costs in the Municipal Court and in this appellate court.

AFFIRMED IN PART AND REVERSED IN PART.

Barnes, P. J., and Fitch, J., concur.







344 - 28179

JOHN MILLER,  
Appellee.

vs.

MRS. HELEN WASHBURN,  
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE CRISLEY DELIVERED THE OPINION OF THE COURT.

On June 22, 1922, plaintiff, the owner of premises at No. 2304 Cleveland Avenue, Chicago, commenced an action in forcible detainer in the Municipal Court of Chicago, alleging that he is entitled to the possession of the premises which defendant unlawfully withholds. The cause was tried before the court without a jury, resulting in a finding in plaintiff's favor and the entry of a judgment that plaintiff recover possession and that a writ of restitution issue. Defendant appealed.

After a review of the evidence we have reached the conclusion that the finding is against the evidence and the law, and that the judgment cannot stand.

By written lease, dated November 4, 1916, plaintiff leased to defendant the premises, to be used as a rooming house, for a period of five years, beginning January 1, 1917, and ending December 31, 1921, at a monthly rental of \$60, which rental was all paid by defendant before the end of the term. On October 30, 1921, plaintiff caused a 60 days notice to be served upon defendant, notifying her to deliver up possession at the end of said term. It appears from plaintiff's testimony that she objected to leaving the premises in the middle of the winter. After the expiration of said term she retained possession, without any new agreement being made between the parties. She sent the

[illegible]

and because we have decided to follow a policy of

It will be noted that the above information is being furnished to the Bureau for its information and for its use in the event of a future investigation of the activities of the Communist Party, U.S.A., and its branches and affiliates.

[illegible]

sum of \$60 to plaintiff for rent for the month of January, 1922, and the same was accepted by him. Under the law this action on his part constituted an election by him to treat her as a tenant for another year ending December 31, 1922, and upon the same terms as in the original written lease. (Evans v. Schwartz, 311 Ill. App. 373, 378; Barbue v. Evans, 230 Ill. App. 154, 155.) She subsequently paid the amount of the rent as stipulated in the original lease for the months of February and March, 1922, and said payments were accepted by plaintiff. On March 27, 1922, plaintiff caused another 60 days notice to be served upon her, to which she seemingly paid no attention. She also paid rent for the months of April and May, 1922, and these payments were also accepted by plaintiff. On May 31, 1922, in payment of rent for June, 1922, she mailed to plaintiff two money orders, aggregating in value the sum of \$60, which plaintiff did not return to her, and made no attempt to do so until during the trial. The attempted termination of the tenancy on May 31, 1922 by the service of said 60 days notice on March 25, 1922 was of no avail. (Cahill's Stat. 1921, chap. 80, sec. 5.)

The judgment of the Municipal Court is reversed.

BY THE COURT.

Barnes, P. J., and Mitch, J., concur.





356 - 28191

JACOB B. HIRSHFELD,  
trading as J. B. Hirshfeld  
& Co.,

Appellee,

vs.

HARRY SCHALLMAN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of the first class in contract, commenced in the Municipal Court of Chicago on January 21, 1921, to recover the balance due on the purchase price of certain underwear sold and delivered, the court at the close of all the evidence instructed the jury to return a verdict finding the issues in plaintiff's favor and assessing his damages at the sum of \$2,815.69. Such verdict was returned and judgment was entered in this sum against defendant and he appealed.

In plaintiff's statement of claim he alleged that the goods were delivered on defendant's orders between March 18, 1920 and October 12, 1920; that the balance due on the purchase price was \$3,108; and that in addition he was entitled to interest, at 5% per annum, on the amounts of the several invoices from the time they respectively became due. Attached to the claim was a full statement of the account, showing the date of the respective orders, what was ordered, the dates of the respective deliveries, all credits allowed and said balance claimed to be due.

On the day after the action was commenced defendant made a payment of \$150. He filed an affidavit of merits on February 7, 1921, in which, although not denying the purchases or the amounts thereof or the deliveries, he set forth certain



affirmative defenses hereinafter mentioned as to all of plaintiff's claim except the sum of \$328, which he admitted to be due. On March 16, 1921, judgment was entered against him in said sum of \$328, and the court reserved for future determination and adjudication the matter of the balance of plaintiff's claim. This judgment of \$328 was thereafter paid. The trial as to said balance was had in May, 1922, and the judgment appealed from was entered on June 19, 1922.

As regards one of the affirmative defenses defendant alleged in his affidavit of merits that at the time the various orders for the goods were given it was verbally agreed between defendant and plaintiff's salesman and agent, named Collins, that, because of the instability of the market and in consideration of the giving of the orders, "defendant should have the right to demand of plaintiff that he delay shipment on any or all orders, or to cancel any or all of them at any time within one year from the date the orders were given;" that on June 5, 1920, by letter addressed to plaintiff he requested that shipment of goods on all unfilled orders be withheld until further notice; that on August 30, 1920, by letter addressed to plaintiff he requested that all orders (sued upon herein) be cancelled, in conformity with said verbal agreement made with said salesman; that plaintiff, wholly disregarding said verbal agreement and the request made in said last mentioned letter, shipped the goods; and that said goods are now in the possession of a railroad company "upon which said goods were shipped."

Under the pleadings the sole issue of fact was whether plaintiff, through his agent, Collins, had verbally agreed with defendant that the latter might at his option cancel the orders upon which the present action is based. Collins testified to the effect that no such verbal agreement was made. Defendant's testimony on this point is vague. He does not say that Collins



Alternative Defendant's testimony was to the effect that Plaintiff's claim against the sum of \$5000, which he admitted to be due. On March 18, 1931, judgment was entered against him in said sum of \$5000, and the court reserved for future determination and adjournment the matter of the balance of Plaintiff's claim. This judgment of 1931 was entered on July 1, 1931, and the balance was paid in May, 1932, and the judgment appealed from was entered on June 15, 1932.

As regards one of the alternative defenses advanced alleged in his alternative of service that at the time the various orders for the goods were given it was verbally agreed between Defendant and Plaintiff's salesman and agent, named Collins, that because of the instability of the market and in consideration of the giving of the order, Defendant should have the right to demand of Plaintiff that he delay shipment on any or all orders, or to cancel any or all of them at any time within one year from the date the order was given; that on June 8, 1930, by letter addressed to Plaintiff he requested that shipment of goods on all notified orders be withheld until further notice; that on August 11, 1930, by letter addressed to Plaintiff he requested that all orders (most upon which) be cancelled; he contended that such verbal agreement was with said salesman; that Plaintiff, wholly disregarding said verbal agreement and the request made in said last mentioned letter, shipped the goods; and that said goods are now in the possession of a railroad company "upon which said goods were shipped."

Under the foregoing the sole issue of fact was whether Plaintiff, through his agent, Collins, had verbally agreed with Defendant that the latter might at his option cancel the orders upon which the present action is based. Collins testified to the effect that no such verbal agreement was made. Defendant's testimony on this point is vague. He does not say that Collins



said that he could cancel the orders and his version of what was said does not, in our opinion, even tend to show that any verbal agreement for a cancellation of the orders at defendant's option was made. He failed to maintain his affirmative defense, and the court was fully justified in directing a verdict for plaintiff. (Marshall v. Grosse Clothing Co., 184 Ill. 421, 425; Eden v. Drey, 75 Ill. App. 102, 106; Tribune Co. v. McCarthy, 201 Ill. App. 586.)

Defendant in his affidavit of merits also sets up the 4th section, known as the Statute of Frauds section, of the Uniform Sales Act (Cahill's Stat. 1921, Chap. 121a, Sec. 7). It is therein provided in part:

"A contract to sell or a sale of any goods or choses in action of the value of \$500 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless," etc.

From the undisputed evidence contained in the present record it appears that, as to the sale of the goods in controversy defendant accepted and actually received part of the same and also gave something in part payment thereof. In our opinion there is no merit in this defense.

For the reasons indicated the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

and that he could amend the order and his version of what was said does not, in my opinion, even tend to show that any verbal agreement for a commission of the order of defendant's opinion was made. He failed to maintain his affirmative defense, and the court was fully justified in dismissing a verdict for plaintiff.

Wheeler v. George Washington Co., 125 Ill. 411, 417, 418.  
Wheeler v. George Washington Co., 125 Ill. 411, 417, 418.  
Wheeler v. George Washington Co., 125 Ill. 411, 417, 418.

Defendant in his affidavit of merits also sets up the 4th section, inasmuch as the statute of Illinois section, of the Uniform Sales Act (Illinois' Stat. 1921, Chap. 121, Sec. 5). It is therein provided in part:

"A contract to sell or a sale of goods or choses in action of the kind or character shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action or shall be paid or paid or paid, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or advance, etc."

From the undisputed evidence contained in the present record it appears that, as to the sale of the goods in controversy defendant accepted and actually received part of the goods and also gave something in part payment thereof. In my opinion there is no merit in this defense.

Now the reasons indicated the judgment of the defendant Court is affirmed.

Wheeler v. George Washington Co., 125 Ill. 411, 417, 418.

ANDERS D. CRONSTEDT, doing  
business as A. D. Cronstedt  
& Co.,

Appellant.

vs.

ALEXANDER ROGERS,  
Appellee.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action of the first class commenced in the Municipal Court of Chicago on August 25, 1921. Plaintiff, a Chicago real estate broker, sought to recover the sum of \$2,000 as a commission, and also the further sum of \$6,000 as damages, because of the failure of defendant to consummate a real estate contract executed by him and one Randolph Matteson on April 29, 1921, for the exchange of certain properties. There was a trial before a jury, at which plaintiff and defendant and other witnesses testified and considerable written evidence was introduced. At the conclusion of the hearing the court, on defendant's motion, instructed the jury to return a verdict finding the issues for defendant, which they did, and on February 18, 1922, judgment was entered against plaintiff for costs, and this appeal followed.

The contract is the common printed form of a real estate contract completed in typewriting. It was negotiated largely through plaintiff's efforts. According to its provisions defendant and Matteson agree to the exchange of defendant's farm of 410 acres, located in Sullivan County, Indiana, subject to a first mortgage of \$45,000, bearing 6% interest per annum, which mortgage has pre-payments of \$1000 every six months for 4-1/2 years, balance in 5 years from date, and Matteson's 36 apartment

1941 - 1942

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There is no evidence of any other persons being present at the time of the shooting.

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To see the history of change, please refer to the enclosed.

10. The above information was obtained from the records of the FBI, dated 10/10/68.

- 2 -

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, 1891.

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Ann. Entomol. Soc. America [Vol. 50, No. 1, 1957]

and several other activities are being carried out in order to

no person will be allowed to be present.

Following a number of years of hard work, following a long

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There is no other person named in the caption and

... ..

January through November, 1994. January through November, 1994.

TABLE 1. *Estimated values of the parameters of the model for the 1997-1998 season*

U. S. DEPARTMENT OF AGRICULTURE, BUREAU OF PLANT INDUSTRY, WASHINGTON, D. C.

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

Al-2 was added to water and to 100-ppm and 500-ppm



building, located at 945-953 Galt Avenue, Chicago, subject to a first mortgage of \$93,000, due in semi-annual installments of \$2,000 each until December, 1944, and the balance in June, 1945, and bearing 6% interest per annum; also subject to a second mortgage of \$14,000, bearing 6% interest per annum and maturing, \$7,000 in December, 1931, and \$7,000 in June, 1933. It is further provided that defendant shall pay Matteson \$52,000 in cash at the date of the delivery of the deeds; that "brokerage fees or commissions shall be paid A. D. Cronstedt & Co. by the respective parties hereto as heretofore agreed between them and said broker;" and that "this contract shall be held by A. D. Cronstedt & Co. for the mutual benefit of the parties concerned, and after consummation thereof A. D. Cronstedt & Co. shall cancel and retain this contract permanently." On May 7, 1921, a "supplementary agreement" was executed, bearing the signature of defendant and signed in Matteson's name "by A. D. Cronstedt, agent." In its preamble mention is made of the execution of said contract of April 29, 1921, for the exchange of the properties - Matteson's apartment building being described as "845-53 Galt Avenue," and it is agreed that, in the event that the acreage of defendant's farm (mentioned in said contract as containing 410 acres) is found upon actual measurement to contain more or less than 410 acres, the difference will be settled on the basis of \$200 per acre. On April 21, 1921, eight days prior to the execution of the contract, plaintiff signed and delivered to defendant a written memorandum agreeing "to accept \$1000 from you as my commission in the deal for your farm, between yourself and Randolph Matteson."

Plaintiff in his amended statement of claim avers in substance that in January, 1921, defendant, a resident of Indianapolis, Indiana, and the owner of an unencumbered Indiana farm, applied to plaintiff to bring about its exchange for improved Chicago real estate; that at various times thereafter plaintiff exhibited to

U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, WASHINGTON, D.C. 20535

10. Administrative Expenses - \$100,000. To include:

Approved & as forholder only; names not associated with article are

...and the amount of the loan is \$10,000.

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and to show that the proposed method is more efficient than the existing methods.

State to the University of the South

THE UNIVERSITY OF CHICAGO LIBRARY

\* Analysis of variance was used to compare the two groups.

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the first part of the book, the author makes it clear that the book is not intended to be a comprehensive survey of the field, but rather a guide to the literature.

Source: AIR, dated 14 Dec 1964, File # 100-100000, Page 100-100000.

and "Scientific Correspondence" is listed, but none are cited.

Approved for release by NSA on 08-28-2014 pursuant to E.O. 13526

“... 2000 年 12 月 31 日，本公司净资产为 10,000 万元，其中：股本 10,000 万元，资本公积 0 万元，盈余公积 0 万元，未分配利润 0 万元。”

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U.S. DEPARTMENT OF COMMERCE

participation in the group. Also, as mentioned, most individuals to receive

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1990-1991

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1968-1969

doi:10.1017/S002229240000205 Printed in the United Kingdom

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[illegible]

of the Department of the Interior, Bureau of Land Management, 1981, and the National Academy of Sciences, 1981.

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Image at 510% resolution: not available, will be displayed at 100%.

defendant various improved properties in Chicago which had been listed with plaintiff for sale or exchange, among them Matteson's apartment building; that on April 21, 1921, defendant signed a contract for the exchange of 320 acres of his farm for the Matteson building, upon certain terms therein stated, and that on the same day defendant agreed to pay plaintiff \$1,000 as commissions upon the execution of the contract by Matteson, which small commission plaintiff informed defendant he would accept because of the large commission he would receive from Matteson if the exchange was consummated; that Matteson refused to sign this contract; that thereafter, through the efforts of plaintiff, the contract of April 29, 1921, was signed by both defendant and Matteson, - defendant having verbally agreed with plaintiff to pay him a commission of \$2,000 for procuring its execution by Matteson; that plaintiff agreed to accept from defendant such small commission in consideration of defendant's promise that, if the contract was finally executed by both parties, defendant would consummate the same, upon which consummation plaintiff, under his verbal agreement with Matteson, would receive from Matteson a large sum as a commission, to-wit, \$6,000, and of which verbal agreement between plaintiff and Matteson defendant had knowledge; that certain modifications in the terms of the contract were made by mutual agreement between Matteson and defendant during May, 1921; that in July, 1921, a further modification was agreed to; that Matteson has always been ready, willing and able to consummate the contract, and in July, 1921, caused a deed of his said Galt avenue property, executed in accordance with the contract as modified, to be tendered to defendant, which deed was refused by defendant; that defendant has refused, and still refuses to consummate the contract, and has failed to pay plaintiff the \$2,000; and that plaintiff sues for \$8,000, being \$2,000 for said commission agreed to be paid by defendant, and \$6,000, as damages sustained by defendant's failure and refusal to consummate the contract. which sum upon consummation







would have been due to plaintiff from Matteson.

Defendant, in his affidavit of merits as amended, denies he agreed at any time to pay plaintiff \$1,000 or any other sum as a commission upon the execution of the contract, and alleges that it was agreed that defendant was not to pay any commission to plaintiff until the contract was actually consummated, which consummation failed without fault on defendant's part; denies that Matteson has been ready, willing and able to consummate the contract or that he at any time made any tender of performance on his part which was in accord with the provisions of the contract; and alleges in substance that defendant was induced to sign the contract by plaintiff upon his representations that he could and would procure a sufficient loan on defendant's farm, which was unencumbered, in order that defendant might have the necessary funds to make the cash payment to Matteson provided for in the contract; that plaintiff failed to procure the loan for \$45,000, which under the contract was to be secured by a first mortgage in that amount upon defendant's farm; that plaintiff prevented defendant from raising a sufficient sum by a first mortgage loan upon the farm to comply with the terms of the contract; that plaintiff falsely represented to defendant that the gross annual rentals of Matteson's building amounted to \$35,640, when in fact he knew or should have known that they were considerably less, and also falsely represented that, as to the second mortgage on Matteson's building of \$14,000, mentioned in the contract, \$7,000 thereof matured in December, 1921, whereas in fact said maturity was in June, 1921, as plaintiff knew or should have known; that defendant relied upon the truth of these representations when he signed the contract; and that defendant has been at all times ready and willing to consummate the contract upon plaintiff procuring the necessary loan on the farm as agreed by him, upon said misrepresentations being adjusted by Matteson, and upon Matteson's

could have been the result of a mistake.

Consequently, in the absence of any other

evidence he cannot be held to have been negligent. It is not an

easy thing to say that the evidence is not sufficient to

show that the defendant was negligent. It is not an

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carrying out the terms of the contract on his part to be performed.

The main contention of plaintiff's counsel is that the trial court erred in instructing the jury to return a verdict in favor of defendant. After a careful review of the evidence we have reached the conclusion that plaintiff was not entitled as a matter of law to recover from defendant any sum as commissions, or as damages as alleged, and that the court did not err in directing a verdict for defendant and in entering the judgment appealed from.

It clearly appears from the evidence, we think, that the consummation of the contract between defendant and Matteson was contingent upon the procuring of a loan of \$45,000 on defendant's farm. As the contract discloses, Matteson demanded \$52,000 in cash, to be paid by defendant when the seeds were delivered. Apparently it was necessary that defendant raise the major portion of this sum by the procuring of such loan, and all parties concerned knew this, and also knew that its procurement was dependent upon the action of some third person, over whom neither defendant nor Matteson had any control. By the contract Matteson agreed to accept defendant's farm "subject to a first mortgage of \$45,000," at a time when he, as well as plaintiff, knew that the farm was unincumbered. There is a conflict in the testimony of plaintiff and defendant as to who, under their verbal arrangement, would procure such loan. Plaintiff says it was understood that defendant would procure it; defendant says plaintiff represented to him that he was in a position to negotiate it and would do so. We deem it immaterial who was to negotiate it. The fact remains it was not procured. Plaintiff tried and failed and defendant tried and failed, and we think that defendant's failure was occasioned, in part at least, by an unwarranted act of plaintiff. It appears that while defendant was endeavoring to negotiate the loan on his farm about the middle of June, 1921, he for the first time dis-



concerning the terms of the contract on his part in the  
contract.

The main contention of Plaintiff's counsel is that the  
total amount owed to Defendant has been ascertained to be  
less than the amount of the contract. When a contract is made  
it is made on the basis of the facts and circumstances then  
existing. It is not to be construed as a contract to be  
made on the basis of facts and circumstances then existing,  
but on the basis of facts and circumstances then existing.  
The contract is a contract to be made on the basis of facts  
and circumstances then existing.

It is clearly apparent from the evidence, that the

contract is a contract to be made on the basis of facts

and circumstances then existing.

There is no evidence to show that the contract is a contract

to be made on the basis of facts and circumstances then existing.

It is not necessary to say that the contract is a contract

to be made on the basis of facts and circumstances then existing.

It is also clear that the contract is a contract to be made

on the basis of facts and circumstances then existing.

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covered that on May 14, 1921, (only 16 days after the execution of the written contract) plaintiff had caused to be recorded in the recorder's office of Sullivan county, Indiana, said written contract, as a lien against defendant's farm, to which contract was attached the joint affidavit of plaintiff and an assistant of his, named Laseen, wherein it is stated that affiants "are the duly authorized agents for Alexander Rogers \* \* of Indianapolis, Marion County, Indiana, and Randolph Matteson, of Chicago, Cook County, Illinois," and that "it was agreed by and between all the parties to said contract that the said affiants were to be paid for their services as follows: The amount of the agreed purchase price in said exchange being \$312,500, upon which amount the sum to be paid for their services is based." The recording of this contract was in violation of a provision therein contained, viz: "This contract shall be held by A. C. Granstedt & Co. for the mutual benefit of the parties concerned." And said recording at least tended to prevent the negotiation of any first mortgage loan on said farm. Plaintiff testified: "I recorded this contract against Mr. Rogers' property for protection. \* \* It is customary when we are 'leery' about one side of a contract, - we record them. I didn't record this against Mr. Matteson's property." He understood it to be the law of this State that where a broker or agent seeks to recover commissions from his principal, and where the contemplated sale or exchange is not consummated, he must not have been at fault; (Meuneg v. New, 131 Ill. 126, 136; Wilson v. Mason, 158 Ill. 304, 310); and must at all times have exercised the utmost good faith towards the principal. (Hafner v. Barron, 165 Ill. 242, 247.)

Counsel for defendant in their printed argument mention several other reasons why the trial court was justified in directing a verdict for defendant. Among them are (1) that where a contract is made -



which is dependent upon the acts of a third person over whom neither party to the contract has control, no rights can be maintained under the contract until such condition has been performed, and (2) that the evidence does not sufficiently show that Matteson was ready and able to convey his apartment building to defendant, giving him the title contracted for, and that the mere tender of a deed was not sufficient to show such ability. Under the facts disclosed we think there is merit in these contentions. (Stephany v. Easton, 168 Ill. 53, 59; Miller v. Wilson, 37 Ill. App. 394, 422; Hershey v. Wells, 103 Ill. App. 418, 422.)

For the reasons indicated the judgment of the Municipal Court is affirmed.

CEFFREND.

Barnes, P. J., and Fitch, J., concur.





381 - 28216

MRS. WILLIAM DE BEAUX,  
Appellee,

vs.

EDWARD EVAN DAVIES,  
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2291A

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in contract for the recovery of money claimed to be due and owing by defendant to plaintiff for the rental of a furnished room at 4859 Kenmore Avenue, Chicago, the jury, on April 3, 1931, returned a verdict against defendant, assessing plaintiff's damages at \$80. Judgment was entered on the verdict against defendant and he appealed. No brief has here been filed by plaintiff.

It appears from the testimony of plaintiff's witnesses in substance that on October 2, 1931, defendant, in company with Mrs. Dale Marilyn and Miss Helen Walters, called on plaintiff at her home; that defendant stated that he desired to rent a room for the two women, which would be occupied by them; that it was thereupon verbally agreed between plaintiff and defendant that the former would lease to the latter the room at a rental of \$15 per week, payable weekly, so long as either or both of the women should occupy the room, the rent to be paid by defendant; that the women immediately took possession of the room and both occupied it for a period of about two weeks when Miss Walters left; that about this time defendant verbally agreed to pay the rent until November 15th; that Mrs. Marilyn continued to occupy the room until November 15th, when she left, and that defendant paid the rent for the



first two weeks but failed to pay any sum for the four weeks beginning October 16, 1931. Plaintiff claimed that defendant owed her \$60.

It is undisputed that defendant paid plaintiff as rent for the room the sum of \$30 in two payments. While there is some conflict in the testimony as to the date when the women commenced to occupy the room, whether on October 2nd or 9th, and while defendant's evidence tended to show that after he made the original agreement he notified plaintiff that he would not be responsible for more than the amount he had paid, we are of the opinion, after reviewing the entire record, that the verdict is sufficiently sustained by the evidence. We find no prejudicial error in the court's instructions. The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch J., concur.

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

[illegible]

• • • • •

17th July 1950



401 - 28236

BLUM'S INC., for use of  
Continental Casualty Co.,  
a corporation,

Appellee.

vs.

THE MOONEY-BOLAND-SUTHERLAND  
CORPORATION,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit, commenced in the Municipal Court of Chicago on October 25, 1920, the jury returned a verdict finding the issues against defendant and assessing plaintiff's damages at the sum of \$4,490. Judgment was entered on the verdict against defendant on July 15, 1922, and this appeal followed.

In July and August, 1920, plaintiff operated stores in the Congress Hotel block, at Nos. 522 to 524 South Michigan Avenue, Chicago, where it sold women's wearing apparel. There were several large show windows fronting on the street. Defendant was engaged in the business of a detective agency in said city. During July, 1920, defendant by oral contract with plaintiff agreed to furnish to plaintiff, for the consideration of \$8 per day, a watchman to guard said show windows from nine o'clock in the evening to six o'clock in the morning, the contract to continue in force until cancelled by either party. This oral contract was confirmed by a letter written by defendant to Mr. Edward Blum, General Manager of plaintiff, dated August 2, 1920, as follows: "We wish to confirm the rate quoted you of \$8 per day, for men to watch the windows of your stores in the Congress Hotel, from 9 P. M. until 6 A. M. We thank you for this assignment, and assure you of our co-operation."



Following the making of the contract defendant each night sent a watchman to guard the windows during said hours. During the early part of August, 1930, the first watchman was withdrawn and another one, named Thompson, was detailed by defendant for the work, and Thompson each night, during said hours and until the early morning of August 26, 1930, was on his job, guarding the windows. About 4:20 A. M. on that morning he says he was seized with violent pains and cramps, necessitating his going to a toilet. He left his post and instead of seeking a nearby toilet in the Congress hotel he went to a saloon a few blocks away and did not return to his post. During his absence, and approximately one-half hour after his departure certain unknown and unapprehended persons broke one of the show windows, by means of a large cobble stone thrown through it, and stole and carried away a valuable Hudson Bay sable coat which was displayed in the window, and which, the evidence discloses, was never recovered back, and which cost plaintiff \$4,000 plus a war tax of \$400. Plaintiff's amended statement of claim was framed, and its case was tried, on the theory that defendant breached its contract in failing to have a watchman guarding the windows at the time in question and that such failure was the proximate cause of the loss of the coat.

Various points are urged by counsel for defendant as grounds for a reversal of the judgment, among them that the absence of the watchman was not the proximate cause of the loss, that the "illness" of the watchman at the time in question excused performance of the contract by defendant, and that the measure of plaintiff's damages is not the value of the stolen coat, but that the proper measure "is the amount contracted to be paid by plaintiff to defendant for one night's service which was not furnished it for the full number of hours







contracted for." We cannot agree with any of the contentions. It is apparent that plaintiff's object in entering into the contract was to be afforded protection from burglary or theft, and defendant agreed to furnish a watchman to that end and for the stipulated consideration, and its contract was breached at the time and in the manner shown. Protection to plaintiff was of the very essence of the contract. We think that the jury were fully justified in finding by their verdict that the absence of defendant's watchman was the proximate cause of plaintiff's loss. (Missouri Dist. Telegraph Co. v. Morris & Co., 243 Fed. Rep. 481, 495; Thealton Packing Co. v. Aetna Ins. Co., 185 Fed. Rep. 108; Boutin v. Ridd, 92 Fed. Rep. 685, 687.) And the illness of defendant's watchman at the time in question did not excuse performance of the contract on defendant's part. In Columbus Y. & Power Co. v. Columbus, 249 U. S. 307, 412, it is said: "If a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail." In Summers v. Highland & Co., 153 Ill. 182, 118, it is said: "The general doctrine is, that where parties, by their own contract and positive undertaking, create a duty or charge upon themselves, they must abide by the contract and make the promise good, and either do the act or pay the damages." And we think that the damages assessed by the jury were, under the evidence, proper and not excessive.

Complaint is made of certain alleged improper conduct on the part of plaintiff's attorney on the trial and of certain alleged erroneous rulings of the court admitting certain evidence. We do not find that defendant was in any way prejudiced by such



conduct or rulings.

The court orally instructed the jury. Certain portions of the charge, objected to at the time, are complained of, as are also certain rulings of the court in refusing to give to the jury certain instructions offered by defendant. We have examined the charge and are of the opinion that the jury was fully and fairly instructed, that no error prejudicial to defendant is contained therein, and that the court did not err in refusing to give the instructions offered by defendant.

Finding no reversible error in the record the judgment of the Municipal Court will be affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

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at 2700 cm<sup>-1</sup> (ν<sub>OH</sub>) and 1650 cm<sup>-1</sup> (ν<sub>C=O</sub>) with the carbonyl stretching band around 1700 cm<sup>-1</sup>.

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THE WILSON MURPHY COMPANY,  
a corporation,

Appellee,

vs.

HOSPITAL EQUIPMENT BUREAU,  
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2291 A. 253

THIS COURT ADOPTS THE FOLLOWING OPINION WRITTEN BY THE LATE  
MR. JUSTICE MCNEILL.

This appeal is prosecuted by the defendant in the court below to review a judgment of the Municipal Court of Chicago upon a verdict for \$901.75 in favor of the plaintiff, who is appellee here.

The action was brought to recover the amount alleged to be due from defendant to plaintiff for merchandise sold and delivered. Plaintiff is an Ohio corporation doing business at Canton, Ohio, and defendant is an Illinois corporation doing business at Chicago. The amount of plaintiff's claim was \$922.90. Defendant admitted the receipt of the merchandise and did not dispute the prices charged except as to one item upon which it claimed a credit of \$30.15, which was allowed by the jury. Defendant filed a claim of set-off based upon an alleged agreement of plaintiff to sell certain merchandise at an agreed price, and its failure to deliver in conformity therewith, and alleged damages of \$1,000 on account thereof. The verdict assessed the "plaintiff's damages at the sum of \$901.75, \$1.00 being allowed defendant as damages." Appellant contends that the court erred in refusing to set aside this verdict, which, it is argued, is uncertain, ambiguous and inconsistent and not a verdict upon which the court could enter judgment or upon which execution

1. The first part of the document is a list of names and addresses, which are arranged in two columns. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Smith", "Mary Jones", and "Robert Brown", along with their respective addresses in various cities and states.

This report is submitted by the National Bureau of Standards to the National Academy of Sciences, National Research Council, and the National Institute of Standards and Technology, as requested by the National Academy of Sciences, National Research Council, and the National Institute of Standards and Technology, in their report to the President of the United States, dated June 1964, and in their report to the President of the United States, dated June 1964.

The action was brought to prevent the recovery of the money advanced by the plaintiff for the purchase of the land and the return of the land to the plaintiff.

[illegible]

and, since the Commission is charged with the duty of maintaining

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its program. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its program.

... ..

could be issued. We find no ambiguity or uncertainty about the verdict. Plaintiff's claim was for \$922.90. The jury evidently allowed defendant a credit of \$30.15 claimed for mistake in prices and \$1 on account of its claim of set-off, thereby reducing plaintiff's damages to \$901.75, which was the amount of the verdict. The words and figures "\$1.00 being allowed defendant as damages" may be rejected as surplusage. There can be no mistake as to what the jury intended. Under the circumstances, a separate verdict upon the claim of set-off was unnecessary.

Appellant also urges as a ground for reversal that appellee was a foreign corporation doing business in this state without a certificate of authority from the Secretary of State as required by law, and therefore could not recover. The record shows that appellee had an office in Chicago, where it received orders for articles manufactured by it; that it had no manufacturing plant in Illinois and kept no stock of goods in this state; that its manufacturing was done at Canton, Ohio, and that all of the goods sold to defendant were shipped by express from Canton, Ohio, and that defendant's orders were not filled from stock kept in Illinois.

The mere fact that appellee had an office in Chicago where it received orders for its merchandise and where such orders may have been solicited does not establish the fact that appellee was doing business in this state within the meaning of the statute. Journal Co. v. F. A. L. Motor Co., 181 Ill. App. 530; Journal Printing Co. v. Inter-Ocean Newspaper Co., 187 id. 274. "Doing business" in this state means the transaction of the ordinary business in which the corporation is engaged. Alpena Cement Co. v. Jenkins, 244 Ill. 354; Boaz v. Texas-Pacific Ry. Co., 250 id. 376. The ordinary business of appellee







was manufacturing and selling certain rubber goods. This business was conducted at Canton, Ohio. The verdict of the jury to this effect is fully sustained by the evidence.

It is also apparent that the transactions between the parties constituted interstate commerce as defined in International Textbook Co. v. Pigg, 217 U. S. 91. The statute of this state prescribing the conditions under which foreign corporations may do business in the state has no application to foreign corporations which are engaged in interstate commerce. Lehigh Cement Co. v. McLean, 245 Ill. 326; American Art Works v. Chicago Picture Frame Co., 264 id. 610.

The judgment of the Municipal Court is in conformity with the law and the evidence, and is therefore affirmed.

AFFIRMED.



309 - 28144

LORA SMITH,  
Appellee.

vs.

GEORGE E. HARRIS,  
Appellant.

APPEAL FROM

COUNTY COURT.

COOK COUNTY.

229 I.A. 653<sup>2</sup>

THIS COURT ADOPTS THE FOLLOWING OPINION WRITTEN BY THE LATE  
MR. JUSTICE MORRILL.

Plaintiff brought suit in the County Court of Cook County to recover for damages to her automobile resulting from a collision with a car owned and operated by defendant, whom she charged with negligence which caused the collision mentioned. The accident occurred February 12, 1931, near the intersection of Fifty-fourth street and Hyde Park boulevard in Chicago. There was a jury trial resulting in a verdict and judgment in favor of plaintiff for \$222.80, from which defendant has appealed. No brief is filed by appellee.

Plaintiff's evidence showed that she was driving her automobile in a southerly direction on Hyde Park boulevard approaching the intersection of Fifty-fourth street while the defendant was driving northerly on Hyde Park boulevard, turning west at Fifty-fourth street; that defendant's car passed to the left of the center of these two intersections; that plaintiff's car was travelling at a speed of more than fifteen miles an hour through a built-up residence section of Chicago. Each of the streets is from fifty to sixty feet wide. Plaintiff was north of the middle of Fifty-fourth street at the time defendant turned west at a distance of more than thirty feet to the south of her. She did not use her emergency brake but could stop her car within five or six feet by the use of her foot brake.

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The court gave the jury the following instruction:

"The Court instructs the jury that if you believe from the evidence that the automobile of the plaintiff was damaged as charged in the plaintiff's declaration, and that before and at the time of the accident, the plaintiff was in the exercise of ordinary care of the safety of her automobile, then you should find the issues for the plaintiff and assess plaintiff's damages at such sum as you believe from the evidence would be the reasonable and necessary cost of repairing the plaintiff's automobile and of placing it in the same condition that it was in just prior to the accident."

The giving of this instruction was reversible error, because it omitted to mention the material fact of defendant's negligence while purporting to state all facts necessary to be found by the jury in order to hold defendant guilty. Negligence was the gist of the action. The instruction directed a verdict and should have stated every essential element which it was necessary for plaintiff to prove in order to recover. Chicago City Ry. Co. v. Dinmore, 163 Ill. 658; Jones v. Campbell, 148 Ill. App. 158; Ross v. Chicago City Ry. Co., No. 23908, Illinois Appellate Court, First District, not yet reported.

Appellant also contends that plaintiff was guilty of contributory negligence, which caused the accident. As there may be another trial of the case, we refrain from discussing the evidence in that respect.

The judgment of the County Court is reversed and the case remanded.

REVERSED AND REMANDED.

1. The first of these is the fact that the system is not a simple one, and that the results are not always the same.

1. The above information was obtained from the files of the Department of the Interior, Bureau of Land Management, and is being furnished to you for your information.

These differences are attributed both to shifts in

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*E. coli* O157:H7 cases by age group—United States, 2000

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1. The first group of people who are not in the labor force are those who are not in the labor force because they are not in the labor force.

Figure 1.1. The function  $f(x) = x^2$  is a parabola opening upwards with its vertex at the origin (0,0). The x-axis and y-axis are shown, with the curve passing through points like (1,1) and (-1,1).

322 - 28157

CHRISTINA H. HAUCK,

Appellee,

vs.

CITY OF CHICAGO,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

THIS COURT ADOPTS THE FOLLOWING OPINION WRITTEN BY THE LATE  
MR. JUSTICE MORRILL.

This is a personal injury suit against the City of Chicago and the Peoples Gas Light & Coke Company, in which plaintiff sought to recover damages sustained by her through stepping into a hole in a sidewalk, causing her to fall and thereby suffer injuries of a serious character. The declaration charged defendant, Peoples Gas Light & Coke Company, with breaking the sidewalk in question for the purpose of placing certain pipes and leaving the same in an unsafe and dangerous condition, and that the defendant City of Chicago was guilty of negligence in permitting the said sidewalk to remain in a dangerous, broken and defective condition for a period of over two years. There was a jury trial resulting in a verdict and judgment for \$5800 in favor of plaintiff and against defendant, City of Chicago, from which the latter has appealed. The record shows that after the verdict, but before judgment thereon, the case was dismissed without costs as to the defendant Peoples Gas Light & Coke Company on motion of plaintiff's attorney.

Appellant contends that the court erred in dismissing the case as to the defendant Peoples Gas Light & Coke Company after the rendition of a joint verdict against both defendants and that a judgment at law must be a unit as to all the defendants, citing numerous cases which it is unnecessary for us to

[illegible]



review. The statute of this state gives plaintiff the right to discontinue the action as to one of the joint defendants at any time before judgment. Cahill's Statutes, Chap. 110, Par. 30. It has been held repeatedly that the dismissal of a case as to one joint tort feaser after verdict and before judgment is not error. Postal Telegraph Cable Co. v. Likes, 225 Ill. 249; Mordhaus v. Vandolin Railway, 248 id. 166; Pecararo v. Halberg, 246 id. 95. Consequently, no error was committed in dismissing the case as to the defendant, Peoples Gas Light & Coke Company, after verdict and before judgment.

Appellant further contends that the appellee did not exercise ordinary care for her own safety at the time of the accident and was guilty of contributory negligence, precluding a recovery. The evidence shows that the accident occurred shortly after four P. M. April 15, 1917, at the northwest corner of Division and Wells streets, Chicago. Wells street runs north and south, and Division street east and west. On that day appellee was living with her husband at 238 West Division street, where they had resided for forty years prior thereto. She was in good physical condition and had never sustained any injury prior to the one involved herein. She did her own housework and assisted her husband in conducting his hardware store at 236 West Division street. She was then sixty years old. Her husband had a broken arm and was an invalid. He was seventy-five years old. On the day of the accident they left their home at about four P. M. and walked in an easterly direction on the north sidewalk on Division street with the intention of taking a street car going south on Wells street. Appellee was walking on the inside shielding her husband's broken arm. When they approached the edge of the west sidewalk on Wells street and while appellee was attempting to hail a street car and at the same time assist her husband over the gutter beyond the sidewalk,

[illegible]

she caught her heel in a hole on the outer edge of the sidewalk and fell, causing the injuries mentioned in the declaration. She did not know of the existence of the hole until after the accident. The hole in the sidewalk is described as being semi-circular, about five inches in diameter, and ten to fifteen inches in depth, with ragged edges, and as being on the edge of the sidewalk and opening into the gutter. It was not readily visible to one approaching <sup>from</sup> the west before coming to a point from three to five feet distant from it. In the center of the hole, and about two and one-half inches from either side, there was a perpendicular two inch gas pipe, the top of which was a little below the surface of the sidewalk. The sidewalk had been in the same defective condition for several years.

The evidence shows that appellee was proceeding carefully. She was assisting her crippled husband from the sidewalk to the approaching car. She was holding him with her right hand and signalling the motorman on the car with her left hand. She did not know of the existence of the hole on the edge of the sidewalk. She had a right to assume that the sidewalk was in a reasonably safe condition and free from dangerous defects. City of Chicago v. Babcock, 143 Ill. 358; Brannan v. City of Chicago, 170 Ill. App. 352. She was not obligated to keep her eyes continually fixed upon the sidewalk, and the fact that her attention was diverted momentarily therefrom while assisting her husband and hailing the street car does not show that she was not exercising due care or was guilty of contributory negligence. Under the circumstances shown by the record, it was for the jury to determine these questions. Petro v. Heinz, 299 Ill. 236; Mueller v. Phelps, 252 id. 630. The verdict and judgment were not contrary to the manifest weight of the evidence, and therefore cannot <sup>be</sup> disturbed.

The judgment of the Circuit Court is affirmed.

AFFIRMED.



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DAVID BARONHOLTZ and  
WILLIAM RANDALL, copartners,  
doing business as United  
Auto Wreckers,

Appellees.

vs.

JACOB GIDWITZ,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

THIS COURT ADOPTS THE FOLLOWING OPINION WRITTEN BY THE LATE  
MR. JUSTICE MORRILL.

Plaintiffs brought suit in the Municipal Court of Chicago to recover the purchase price of a certain secondhand Stutz automobile which plaintiffs claim to have sold to defendant October 3, 1921, at an agreed price of \$3,000. Defendant denied the alleged purchase and asserts that he borrowed said automobile from plaintiffs for temporary use for a few days only while his own automobile was being repaired; that he has since offered to return the machine in question to plaintiffs, who have refused to accept the same, and that he has since kept the machine in storage subject to the order of plaintiffs. The case was heard by the court without a jury and resulted in a finding and judgment in favor of plaintiffs for \$3,000, from which defendant has appealed, urging as grounds for reversal that the judgment is contrary to the manifest weight of the evidence, and that the court erred in not granting a new trial on account of newly discovered evidence for defendant. It will not be necessary for us to discuss the latter contention.

The evidence shows that plaintiffs were dealers in secondhand automobiles and that defendant is in the banking business as vice-president of the Community State Bank. Plaintiff Randall testified that on October 3, 1921, he stepped at

THE FOLLOWING IS A SUMMARY OF THE INFORMATION RECEIVED BY THE BUREAU OF INVESTIGATION FROM THE MEMBERS OF THE BOARD OF DIRECTORS OF THE NATIONAL ASSOCIATION OF REALTORS, INC., DURING THE MONTH OF JANUARY, 1934.

THE FOLLOWING IS A SUMMARY OF THE INFORMATION RECEIVED BY THE BUREAU OF INVESTIGATION FROM THE MEMBERS OF THE BOARD OF DIRECTORS OF THE NATIONAL ASSOCIATION OF REALTORS, INC., DURING THE MONTH OF JANUARY, 1934.

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said bank "to transact some business," which it subsequently developed related to his own notes amounting to \$1500 held by defendant; that defendant requested plaintiffs to sell him an automobile; that he offered defendant the car in question at a price of \$3,000 and that after some conversation and after driving the car around the block the defendant said, "Leave it here." He further testified that he did not then ask for any payment on the car; that defendant has paid no part of the purchase price, although on several subsequent occasions did ask for payment. This testimony is corroborated to some extent by another witness, who testified that defendant said he would take the car.

Defendant testified that the conversation in question commenced with an attempt by him to secure payment of the note of plaintiff Randell for \$750, which had matured September 25, 1921; that Randell pleaded inability to pay the note and intimated that he had executed the note without consideration, although it appears to have been given by plaintiffs to one Wechsler in part payment for the car in question, Wechsler having assigned the note to defendant. He further testified that he then told Randell that his Cadillac car was in the repair shop and asked him if he had a car which defendant could use until said repairs were completed; that in reply Randell offered the Stutz car in question, which defendant used for two or three weeks until his own car was repaired; that thereafter he frequently saw the plaintiff Randell, who desired to borrow money from him; that when the Cadillac car was repaired he called up plaintiff Randell and told him that he could get the Stutz car, which was at the public garage where he kept his own car; that Randell replied, in substance, that he had no room for the car at his place of business and asked defendant to find some place for storing it; that it was agreed between them that the car should be stored at the Royal Auto Body Company, where the car has remained







ever since that time subject to the order of plaintiffs. Defendant admitted that he had not paid for the use of the car, but said that he was continually extending business favors to Randell and that he never heard of plaintiffs' claim that defendant had bought the car until the suit was brought.

The record shows that the fair cash value of the car in October, 1921, was from \$1500 to \$1600; that the value of a new car of the same make and model was \$2600; that plaintiff Randell had paid \$1750 for the car, which he is said to have purchased from one Wechsler, and had given his notes for a large part, if not all, of the purchase price; that those notes were held by the defendant Gidwitz and were unpaid. It further shows that plaintiff Randell had offered the car in question for sale to one Fuerstenberg in January, 1922, for \$1350, thereby indicating that he considered himself the owner of the car some three months after he claims to have sold it to defendant.

Plaintiffs seek to recover upon the express agreement of defendant to purchase the car in question at an agreed price of \$3,000. They had the burden of proving their claim by a preponderance of the evidence. The words of defendant upon which plaintiffs rely to prove the express contract to the effect that defendant said he would take the car and directing plaintiffs to leave it with him, were ambiguous and could well have been used by defendant with reference to his proposition to borrow the car and were not necessarily susceptible of the construction placed upon them by plaintiffs that defendant agreed to purchase the car for \$3,000. Defendant expressly denied any agreement to purchase the car. His conduct is shown to have been at all times consistent with his version of the conversation to the effect that he had borrowed the car for temporary use only. The account given by plaintiff Randell as to the transaction seems highly improbable. It is unreasonable to suppose that defendant would agree to pay \$3,000 for a secondhand

ever since that time subject to the order of Plaintiff. Defendant  
and admitted that he had not paid for the car, but  
said that he was occasionally receiving business letters in relation  
and that he never heard of Plaintiff's claim that defendant had  
bought the car until the suit was brought.

The record shows that the fair value of the car  
in October, 1931, was from \$1000 to \$1200; that the value of a  
new car of the same make and model was \$1200; that Plaintiff's car  
had paid \$1000 for the car, which he is said to have purchased from  
one defendant, and had given the notes for a larger part, it was said,  
of the purchase price; that these notes were paid by the defendant;  
Plaintiff and were unpaid. It further shows that Plaintiff's car  
had expired the car in question for sale in any jurisdiction in  
January, 1932, for \$1000, thereby indicating that the defendant  
bought the car of the car some months after he failed to  
have sold it to defendant.

Plaintiff seeks to recover upon the express agreement  
of defendant to purchase the car in question at an agreed price of  
\$1,000. They had the burden of proving that claim by a preponderance  
of the evidence. The claim of defendant upon which Plaintiff  
sought to prove the express agreement in the first place, was  
and said he would take the car and assign Plaintiff to insure it  
with him, with defendant and said that was done by defendant  
also reference to the preponderance in favor of the car was not  
necessarily indicative of the preponderance shown that in  
Plaintiff's first defendant agreed to purchase the car for \$1,000.  
Defendant expressly denied any agreement to purchase the car. The  
court is shown to have been in all cases consistent with the  
fact of the controversy in the effort that he had purchased the car  
for \$1,000 and only. The amount given by Plaintiff's car  
to the defendant seems to be \$1,000. It is recommended to  
the court that the car should be sold to the defendant.

car, which was actually worth between \$1500 and \$1600 and which, if it had been new, could have been purchased for \$2600. At the time when defendant is supposed to have made this agreement he knew that the car had been sold a short time prior thereto to plaintiffs for \$1750, in notes which defendant then held. It is improbable that if a sale was made as plaintiffs contend, they would not request some payment on account, especially as such a payment might have been made on their own notes, which, according to uncontradicted testimony, were held by defendant. Defendant's conduct with reference to the automobile in question is entirely consistent with his version of the agreement. He borrowed the car for temporary use until his own car was repaired. Upon the repair work being completed he tendered the car to plaintiffs and has since kept it in storage subject to their order. A wholly disinterested witness testified that three months after the alleged sale to defendant, plaintiff Randell was endeavoring to sell this car to him for \$1250. Plaintiffs did not bring suit upon the alleged contract of purchase until defendant's bank had brought suit against them on the notes which had been given for the automobile in question. There are other features of the evidence in the case which strongly tend to sustain the defense, but which we do not deem it necessary to discuss in detail. It is apparent that plaintiffs have failed to prove their case by a preponderance of the evidence and that the judgment of the Municipal Court was contrary to the manifest weight of the evidence.

The judgment of the Municipal Court is therefore reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.







374 - 28209

FINDING OF FACT.

The court finds as an ultimate fact in this case that defendant did not agree to purchase from plaintiffs the Ututz automobile mentioned in plaintiffs' statement of claim.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

229 10654

BE IT REMEMBERED, that afterwards, to-wit: on  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





Charles G. Sandry,  
Defendant in error,

vs.

Error to Circuit Court

Chicago, Indiana and Southern Railroad Company  
(The New York Central Railroad Company),  
Plaintiff in error,

of La Salle County.

Jett, J.

This is an action of trespass on the case to recover damages for a personal injury, commenced by Charles G. Sandry, defendant in error against the Chicago, Indiana and Southern Railroad Company, in the circuit court of La Salle, County. The injuries complained of by defendant in error and for which he brought this suit were received by him on February 19, 1912. The declaration was filed February 18, 1914.

A trial of the case was had January 26, 1921. The issues were submitted to a jury and a verdict was returned in favor of the defendant in error for \$3708., and the court, after over-ruling the motions for a new trial and in arrest of judgment, entered judgment on the verdict. This writ of error followed.

The original declaration contained two counts in which the defendant in error charged that he was an employee of the plaintiff in error Company and while engaged in using a hammer weighing about ten pounds in driving a claw bar under a spike head, a piece or fragment of steel flew off the face of said hammer because of its defective condition and tempering and struck defendant in error in his right eye, destroying its sight; that the said hammer was furnished him by the plaintiff in error company and that said company was negligent in improperly repairing and tempering such hammer and furnishing it to him in that condition to use in his work.

The original declaration stated a case of common law negligence only. There was no intimation in the two original counts of the declaration that either defendant or plaintiff in error was engaged in interstate commerce or that defendant in error brought his action under the Federal Employers's Liability Act. At the conclusion



of the taking of all of the evidence the defendant in error by leave of the court first had and obtained, filed an additional count to the declaration in the language of the first count except that it contained apt words and averments sufficient to charge a case and to bring the cause within the Federal Employer's Liability Act.

The plaintiff in error thereupon filed a plea of the statute of limitations to which the defendant in error demurred. This additional count to the declaration, the record discloses was filed January 26, 1921.

The demurrer filed to the plea of the statute of limitations was, by the court overruled and the defendant in error elected to abide by his said demurrer.

In view of the conclusion we have reached it will not be necessary to discuss all of the errors assigned and relied upon by plaintiff in error. We have examined this record closely and thoroughly with the view of determining whether or not the defendant in error and the plaintiff in error, at the time of the injury were engaged in interstate commerce.

We are of the opinion that the undisputed evidence in this cause shows that the defendant and plaintiff in error, at the time the injury was received of which the defendant in error complains, were engaged in interstate commerce. The federal Employer's Liability Act, in a case where both employer and employee are engaged in interstate commerce, is exclusive, and the employee must recover under the act or not at all.

Staley vs I. C. R. R. Co. 268 Ill. 356-377  
Hines vs Ind. Com. 295 Ill. 231-234.  
M. C. R. R. Co. vs Freeland, 227 U. S. 59  
Dunlavy vs C. B. & Q. R. R. Co. 200 App. 75.

We are also of the opinion that defendant in error could not recover under the state of facts as disclosed in this record under the original declaration charging common law negligence; that his only remedy was under the Federal Employer's Liability Act; that the original declaration was not sufficient to permit a recovery under that act; that the plea of the statute of limitations interposed





to the additional count was a good plea and the trial court properly overruled the demurrer thereto; that the court erred in not directing a verdict for the plaintiff in error and also in overruling the plaintiff in error's motions for a new trial and in arrest of judgment.

In passing it should be noted that the plaintiff in error railroad company has been consolidated with the New York Central Railroad Company, and the plaintiff in error company, is now operated under the name of the New York Central Railroad Company, and said last named company has prosecuted this writ of error.

The defendant in error has not filed any briefs in this cause. In view of the fact that there can never be a recovery in this case under the law as we view it, the cause should be reversed and not remanded. The judgment is accordingly reversed.

Reversed.

10425

STATE OF ILLINOIS, }  
SECOND DISTRICT. { ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
Apr. in the year of our Lord one thousand  
nine hundred and twenty- three

*Justus L. Johnson*  
Clerk of the Appellate Court.





11-3-22  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



People of the State of Illinois,  
Defendant in error.

vs.

Error to County Court of  
Lake County.

Stanley Bishop,  
Plaintiff in error.

Jett, J.

This is a prosecution begun in the County Court of Lake County. On April 17, 1922, an information was filed by the State's attorney of said County of Lake, consisting of thirteen counts, in which plaintiff in error was charged with the violation of the Illinois Prohibition Act. A motion was made by plaintiff in error to quash the information and each count thereof. The motion was by the court denied, and the plaintiff in error excepted and assigned error on the ruling of the court in denying the motion to quash. On examination of the record, however, it appears that plaintiff in error did not argue the error complained of in overruling the motion to quash. An application for a change of venue was made by plaintiff in error, he charging that the inhabitants of the county were so prejudiced that he could not obtain a fair trial. Application was denied. A trial was had and the jury found the plaintiff in error guilty under the fourth and eighth counts of the information. The fourth count charged the plaintiff in error with the unlawful possession of a still, in violation of the Prohibition Act, and the eighth count charged the plaintiff in error with unlawfully possessing intoxicating liquor. Motions for a new trial and in arrest of judgment were denied and judgment was rendered upon the verdict of the jury. Sentence was pronounced by the court. Plaintiff in error was sentenced under the fourth count to pay a fine of One Hundred Dollars and to be confined in the county jail for a period of ninety days, and was also sentenced under count eight to the county jail for one hundred eighty days, being two hundred and seventy days in jail and a fine of One Hundred Dollars, and from which judgment and sentence, plaintiff





in error prosecutes this writ of error.

The first point presented by plaintiff in error in his argument is that the trial court erred in denying his motion for a change of venue. On examination of the record it appears that the motion and affidavits in support thereof, as well as the affidavits in opposition to the motion, are not to be found in the bill of exceptions. They appear to have been copied in the record by the clerk of the court, but do not appear in the bill of exceptions. Plaintiff in error is not in a position to insist on this point for the reason that the alleged error has not been properly preserved. The rule is that a petition for a change of venue, on account of the prejudice of the inhabitants of the county, and affidavits in support of the petition and motion, do not become a part of the record unless they are incorporated in the bill of exceptions. People vs. Weston 236 Ill. 104; McElwee vs. People 77 Ill. 493; Chicago and Eastern Illinois Railroad Company vs. Goyette 133 Ill. 21. We have, however, since counsel for defendant in error argued the question of change of venue, taken occasion to see what appeared in the application and affidavits in support of the motion therefor. The showing made by plaintiff in error was not sufficient to entitle him to a change of venue on account of the prejudice of the inhabitants of the county. The mere fact prejudice may have existed in some parts of the county would not be sufficient to authorize the court to grant a change of venue. The rule is, that even though it be shown that there is great prejudice occasioned by the publication of newspapers, and other causes against one accused of crime in the county seat of the county, where he may be or has been tried, or in the locality where the offense was committed, if it appears that in the remainder of the county there is no prejudice, there can be no reasonable apprehension that an accused person cannot obtain a fair and impartial trial. The People vs Murphy 276 Ill. 304. From the showing made by plaintiff in error, and from the counter affidavits filed by the people it is quite clear that there was no reasonable apprehension that said plaintiff in error could not obtain a fair trial in Lake County by a jury drawn from the body of said county.

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The theory which assumes an association in error is that

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It is next insisted by plaintiff in error that the proof is lacking to show that the liquor was fit for beverage purposes. It will be observed that the plaintiff in error was convicted of unlawfully possessing a still under the fourth count of the information, and of unlawfully possessing intoxicating liquor as charged in the eighth count. It cannot be contended that under the charge of possessing a still there is any necessity to prove the liquor was fit for beverage purposes. All that requires under this provision of the statute is to prove the possession of a still, it being an instrument or device to be used for the purpose of manufacturing intoxicating liquor. The testimony is to the effect, that when the officers entered the premises of plaintiff in error with a view of searching them, by virtue of a search warrant with which they were armed, and to seize whatever they might find as evidence that the law was being violated, they obtained the contents of certain exhibits which had been emptied in the toilet. It appears that an effort was made to destroy the contents of certain vessels at and about the time the officers entered the house of the plaintiff in error. A part of the substance that was sought to be destroyed was obtained by the officers. The evidence obtained on this occasion was denominated by the officers as "Moonshine whiskey" and they testified that it was intoxicating. The testimony shows further that when the officers entered the house of the plaintiff in error, he threw himself upon the bed in one of the rooms of the building. The son of plaintiff in error was in the bath room and there were strong odors of liquor and when the officers went into the bath room they found a quantity of moonshine whiskey which had been emptied in the toilet. The testimony of witnesses is to the effect that they went to the farm of the plaintiff in error, or one over which it appears he had control and charge; and on or about the 26th day of January, 1922, found a still in the dwelling house and a number of milk cans, jars and bottles, very useful adjuncts in this business. On this occasion moonshine whiskey was obtained. There is other evidence that tends to prove the charge of the plaintiff in error having in his possession intoxicating liquor. While it is strenuously



It is not intended by statistics in error that the word is  
lacking to show that the figure was the 2nd average number. It will  
be observed that the statistics in error are considered as statistically  
meaningless until after the fourth count of the information, and then  
statistically meaningful information is not as changed in the eighth count.  
It cannot be concluded that under the charge of "assessing a utility"  
there is any necessity to prove the Chamber was the 2nd average number.  
All that requires under this provision of the statute is to prove the  
existence of a utility, it being an instrument for service to be made the  
the purpose of manufacturing information against. The testimony is to  
testify, then when the official makes the payment of statistics  
in error with a view of manufacturing them, in violation of a statute enacted  
with which they were aware, and in which they were aware that the  
evidence that the law was being violated, they violated the statute  
it contains within which has been enacted in the statute. It means  
that an effort was made to "assess" the utility to receive payment of  
and about the time the official ordered the bank to the utility in  
error, it was the intention that was made to be received was of  
value to the utility. The evidence, which is this case, was in-  
corrected by the evidence as "Manufacturing utility" and that testified that  
it was intentional. The testimony that testified that when the utility  
ordered the bank of the statistics in error, he knew himself that the  
fact in one of the cases of the utility. The fact of it being in error  
within the bank and there were strong facts of right and when  
the utility was from the bank and there was a utility of manufacturing  
information which had been enacted in the statute. The testimony of the  
in the evidence that testified that when the utility was in error,  
the utility was in error as the utility was in error; and in the case  
the utility was in error, there is still in the evidence in this  
evidence of which case, there was evidence, that certain evidence in this  
evidence. On this evidence certain evidence was obtained. There is  
other evidence that tends to prove the charges of the statistics in error  
there is the evidence which is in error. It is not intended



argued that the testimony fails to show that the liquors obtained were fit for beverage purposes, we are of the opinion that the showing is sufficient that the substances, call them what you please, were intoxicating. Plaintiff in error may not believe that the proof establishes that it was fit for beverage purposes; there has been sufficient showing made, if the testimony of the prosecution is to be believed, that he violated the statute on which this information was drawn. This article, known as "moonshine whiskey" or "mule" as it is frequently called, is used as a beverage, and manufactured for that purpose, whether it be fit for beverage purposes or not. We do not understand that the prosecution is called upon to make the nice distinctions in its proof as to whether or not the particular kind and character of liquor found in possession of the accused is a fit and proper beverage for man to put in his stomach.

It is next urged that there is not sufficient evidence to sustain the finding of the jury that the utensils found on the farm and offered as exhibits belonged to the plaintiff in error. Upon an examination of the testimony it appears that the officers found a number of the exhibits on the farm in a house which plaintiff in error frequently visited. That there was a quantity of intoxicating liquor found and a still; that plaintiff in error told a number of witnesses that he had purchased the farm; that some one broke in the doors and dumped the mash out of the barrels and that he thought one of his neighbors had done it. Some of these same witnesses had done work on the farm for the plaintiff in error. The witnesses who are neighbors of the plaintiff in error, and resided near the farm testified that on several occasions they saw him going to and from the farm in a buggy with milk cans of the size and type produced in evidence, and containing intoxicating liquor, when found on the premises. Plaintiff in error's explanation of these circumstances and possession of these exhibits simply amounted to a general denial that he knew nothing about them; that they belonged to the hired hand and were placed there without his consent or knowledge. He denies all the charges made against him. If the jury believed the



witnesses for the prosecution they were justified in finding as they did. It is quite evident that the jury did not believe the explanation that was made by the plaintiff in error. The jury were the judges of the credibility of the witnesses and of the weight to be attached to their testimony, and it was for the jury to say wherein the truth lay. We think that the trial court should have allowed more latitude in the cross-examination of the witness, Lunde, who claimed to be a chemist, but we are not prepared to say that the mere fact that the witness was not permitted to answer a question or two that was put to him constituted reversible error.

Some question is raised with reference to the search warrant that was issued and of which the officers were possessed at the time they called at the home of the plaintiff in error. The search warrant does not appear to have been abstracted nor is it to be found in the bill of exceptions, and the question is not properly before us. It is complained that the court erred in refusing to admit certain documents in evidence bearing upon the question as to whether or not the plaintiff in error did own the farm spoken of by the witnesses at a certain date. In view of what has been disclosed by the evidence in this record we are not prepared to say that the ruling of the court prejudiced the rights of the plaintiff in error. He may not have been the owner of the farm at a certain date. The title to the farm may have been in his wife or the possession in a tenant, but that would not prevent him from possessing the still on the farm. As to whether or not he was in possession of this farm was not so material; the question was whether or not he was in possession of the still and the liquor, and on these questions the jury have found against the plaintiff in error. It is stated by plaintiff in error that the court erred in the giving of instructions but no particular error is pointed out that indicated or shows that the plaintiff in error was prejudiced thereby. On an examination of the instructions as a whole we are of the opinion that no reversible error was committed in the giving or in the refusing of instructions. It is further urged that the punishment is excessive. The punishment comes within the terms



[illegible]



and provisions of the statute. The extent of the punishment was with the trial court. The court having observed the witnesses, heard the evidence, conducted the trial, and his judgment being within the terms of the statute we are not prepared to say that the court erred in meting out the punishment as it did.

After a careful examination of all the facts and circumstances appearing in evidence in this cause, and of all the reasons assigned on the part of and by the plaintiff in error for a reversal of the cause, we are of the opinion that no reversible error was committed by the trial court and the judgment of the court below is affirmed.

Judgment affirmed.



STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
Apr. in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.





23  
7120 (30377)  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS A. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff. 229 T.A. 0543

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BE IT REMEMBERED, that afterwards, to-wit: on  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



Thomas J. Killian, Appellee,

vs.

Appeal from the ~~Circuit~~<sup>County</sup>

Continental Auto Insurance Association,  
Appellant.

Court of Lake County

Jett, J.

Suit was instituted in the County Court of Lake County, based on a policy of automobile insurance issued on the 16th day of November 1920, by the appellant to the appellee. The appellee in his declaration charges that on the 19th day of March, 1921, the automobile owned by him and covered by the policy of insurance declared upon herein, ran into a train of the Chicago, Milwaukee & St. Paul Railroad, at or near Shermerville, Illinois, causing a total loss of said automobile.

The appellant plead the general issue; also a special plea pleading a provision of the policy which provided that the appellant would not be liable for any damage to the automobile of appellee while being driven by a person who was intoxicated. Appellant also gave notice that he would give in evidence that the policy sued on provided that the appellant would not be liable in any event beyond the actual cash value of the property injured. Appellant further set up in said special plea that the driver of said car at the time of the accident was intoxicated.

The case was tried before a jury and a verdict returned for \$535 being the amount of the policy less \$25 which appellees witnesses testified he received for the wreckage after the accident. The sum of \$38.20 was remitted by appellee before the motion for a new trial had been argued. Judgment was rendered upon the verdict in favor of appellee and against appellant for \$496.80, being the amount of the verdict less the sum remitted. This appeal followed.

Appellant complains of many errors in the trial of the cause but only two reasons are argued for a reversal of the judgment.

The first reason urged for a reversal is that there was

James J. Kilgus, Attorney

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no competent evidence as to the amount of the damages on which to base a finding. We are of the opinion upon examination of the testimony of the witness McCullough, that he properly qualified himself to testify touching the matters and things about which he was interrogated and that his evidence was proper to go to the jury as bearing upon the amount of damages sustained by appellee, and sufficient upon which to base a finding, if the jury believed him.

It is next contended that George Pritchard who operated the car at the time of the accident was intoxicated, and that under the provisions of the policy the appellant was not liable for any injury, while the car was being driven by a person who was intoxicated. We have examined the evidence relative to such alleged intoxication and, we are of the opinion, that the jury was justified in finding against the contention of the appellant that the driver of the automobile was intoxicated. No one testified that he was intoxicated. The most that can be said from the evidence bearing upon the question of intoxication is that the drivers breath smelled of liquor.

The question as to whether or not he was intoxicated was a one for the jury to pass upon, and the jury having found against the appellant on this question, we are not prepared to say that their finding in this respect was not in accordance with the evidence.

We have examined fully the contention of the appellant for a reversal of this cause, but on due consideration thereof we are satisfied that substantial justice has been done and that the judgment of the lower Court should be and is affirmed.

Affirmed.



STATE OF ILLINOIS, {  
SECOND DISTRICT. ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
Apr. in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.





26  
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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

200 C. L. 6847

BE IT REMEMBERED, that afterwards, to-wit: on  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to wit:



D. B. Allen, Appellant,

vs.

H. F. Arnold, et al.,

Appellees,

Appeal from the Circuit Court  
of Knox County.

Jett, J.

This suit was instituted by appellant before a Justice of the Peace against B. F. Arnold, in his lifetime, to recover commissions growing out of a sale of certain property located in the City of Galesburg, Illinois, from B. F. Arnold to D. B. McElwain. A finding was had before the Justice of the Peace against appellant who prosecuted an appeal to the Circuit Court of Knox County.

While the case was pending in the Circuit Court B. F. Arnold died, his death was suggested and his executors were substituted as parties defendant. The evidence shows that the appellant sold property belonging to the said B. F. Arnold for \$8000. and the claim for commissions was for the making of said sale.

On the trial of the case Marguerite Cumber, a stenographer employed in an office which was occupied by B. F. Arnold also, testified to a conversation between Allen and Arnold that was had before the trade was made, in which Allen, the appellant, said to Arnold he would not expect any commission from Arnold for the sale of the property in question. This witness was not an agent or relative of Arnold. She was a stenographer working in a room in which B. F. Arnold had his office. In rebuttal appellant was asked and interrogated with reference to this alleged conversation, and objection was made and sustained and the court refused to permit him to testify concerning it.

It is insisted by appellant that this evidence was competent under section 2 of chapter 51 of the Statute in relation to evidence and depositions. Our attention has been called to a number of cases that appellant insists supports his contention. We have examined





those cases and we do not understand them to hold as appellant contends.

We are of the opinion that the witness who testified to this conversation between Allen and Arnold does not come within any of the exceptions to the provisions of the Statute relied upon by appellant for the reason she was a disinterested party.

It is next insisted that the court erred in limiting the amount of the recovery to \$200., and this was done by modifying the fifth instruction of appellant.

The record discloses that this suit was begun before a Justice of the Peace, and that the amount demanded in the summons was \$200. At the time of the commencing of the suit before the Justice the jurisdiction of the Justice of the Peace did not exceed \$200. No amendment was had in the Circuit Court increasing the demand and for these reasons the trial court was not in error in modifying the instruction limiting the recovery to \$200.

Moreover, the appellant could not have been injured in any way by the modification of the instruction because the verdict of the jury finding for appellees shows that the jury never got to the point where they could have been influenced by the instruction.

We conclude, therefore, that the suggestions relied upon by appellant for reversal of this cause are not well taken and the judgment of the Circuit Court will be affirmed.

Affirmed.

There is no doubt that the Commission will be able to complete its work by the end of the year.

There is no doubt that the Commission will be able to complete its work by the end of the year.

It is also to be expected that the Commission will be able to complete its work by the end of the year. This commission is to be established in the near future and will be able to complete its work by the end of the year.

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There is no doubt that the Commission will be able to complete its work by the end of the year.

STATE OF ILLINOIS, {  
SECOND DISTRICT. ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 10th day of  
Apr in the year of our Lord one thousand  
nine hundred and twenty- three

*Justus L. Johnson*  
Clerk of the Appellate Court.





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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

229 17600

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BE IT REMEMBERED, that afterwards, to-wit: on  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



Dan Van Matre, appellee

vs

Overland Rockford Company,  
formerly Rockford Overland Company,  
a corporation, appellant.

Appeal from the Circuit

Court of Winnebago County.

Jett, J.

This is a suit in assumpsit brought by appellee against appellant, in the circuit court of Winnebago, County. Judgment was obtained by appellee for \$714.81, a jury having found in favor of appellee for said sum. On refusing motion for a new trial and rendering judgment on the verdict of the jury the appellant excepted and prosecuted its appeal to this court.

It appears that appellant was a distributor of and dealer in automobiles with headquarters and place of business at Rockford, Illinois. Appellee was a subdealer or agent for the sale at retail of automobiles, with headquarters and place of business at Lena, Illinois. This suit is the result of a failure of the parties to adjust their accounts covering a period of some three or four years, the decision of which, largely depends upon the construction to be given to the sales agreements entered into by the parties in this controversy.

We will not make any detailed statement of the facts as this case was before this court at a former term as general number 6879, when an opinion was rendered in which the facts were fully stated. When this case was before this court at a previous term thereof, the appellee here was appellant, and appellant here was appellee.

All of the material questions involved in this case were settled by the judgment of this court in its former opinion.

We then said: "So far as this appeal is concerned the main questions are whether the six cars delivered in September and October prior to the making of the sales agreement of October 11, 1915, and the eighteen cars delivered in March 1916, were to be considered as

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having been delivered under the agreement of October 11, 1915."

After citing a number of authorities and quoting therefrom we further said: "Applying these rules of construction to this case there can be no question but what when the agreement of October 11, 1915, was entered into it was the intention of the parties that this agreement should simply change the agreement of September 4 as to the number of cars and in other respects it was to supersede and carry out the prior agreement and that whatever had been done under the agreement of September 4 should be considered as being part performance of the October 11, 1915, contract. Any other construction would render nugatory the portion of the October 11, 1915, agreement requiring delivery of three cars in September 1915, and we therefore hold that the six cars delivered between September 4, 1915, and October 11, 1915, must be considered as being part performance of the October 11, 1915, agreement.

It was held in our former opinion that appellee had the right to have all the sales he made under any and all of the contracts he entered into with appellant, taken into consideration in arriving at the amount of commissions due him. There is no dispute that appellee sold the number of cars claimed to have been sold by him. Therefore in view of our former holding appellee was entitled to recover the amount due him as excess commissions under his subsequent contracts with appellant.

We find no error in the giving or the refusing of instructions.

We conclude, therefore, in view of the record in this case and of the decision heretofore rendered in this cause and the holdings therein, that substantial justice has been done between the parties in this proceeding and that the judgment of the circuit court should be and is affirmed.

Affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30<sup>th</sup> day of  
Apr. in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.





7128 (30 11)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

2201 A. 555

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BE IT REMEMBERED, that afterwards, to-wit: on  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



Marcy Logan,  
Appellee,

vs.

Appeal from the Circuit Court  
of Winnebago County.

Rockford City Traction Company,  
Appellant.

Jett, J.

Appellee obtained a judgment in the Circuit Court of Winnebago County against the appellant for personal injuries she had sustained in the sum of \$1150 and costs of suit, and from which judgment this appeal is prosecuted.

The declaration consisted of two counts. In the first it was alleged that on to wit, June 1, 1920, appellant operated a certain railway line along and upon a public street in the City of Rockford, known as west State street which said line was intersected by one other certain street known as Webster avenue, and at said point appellant operated there a double track where east and west bound cars met and passed each other. Appellee further averred that at said time and place a west bound car was then travelling west on west State street and appellant was then and there operating an east bound car on west State street. That at said time appellee was riding west bound in an automobile belonging to the Pearl Laundry Company of Rockford then and there being driven by a servant of said Laundry Company, and at said time appellee was in the exercise of due care and caution for her own safety. That said west bound car stopped to let off passengers immediately east of the intersection of said Webster avenue and said west State street and while said car was so stopped to so let off passengers the driver of said automobile nearly caught up with said west bound car and at said point, turned off on said west State street, south at the rear of said west bound car, in and upon Webster avenue on the way to the home of appellee. That as the said driver was so turning off of west State street south in and upon Webster avenue and while in the exercise





of due care and caution for his own safety and for the safety of the automobile which he was then driving said east bound car without any warning ran with great force and violence upon said automobile in which appellee was then so riding, and, by means thereof, appellee was then and there thrown with great violence upon the ground. And by means of the premises appellee was then and there greatly bruised, wounded, sick, sore and disordered and remained so for a long space of time, and was then greatly damaged.

In the second count, being the additional count to the declaration, appellee charged that on to wit, June 1, 1920, appellant was engaged in the business of carrying passengers for hire in street cars upon the streets of the City of Rockford, and then and there was possessed of a double track street railway upon and along west State street and across the intersection of Webster avenue and Royal avenue in the said City of Rockford.

Appellee further avers she was then and there crossing from west State street southerly in to said Webster avenue and was then and there crossing the said tracks of said appellant, and appellee charges that she was then and there using reasonable care for her own safety. That there was then and there in said City of Rockford in full force and effect an ordinance of said City known as chapter 70 entitled "Street Railways" and section one of which said ordinance and article 9 of said section one provided among other things that no car shall run at a greater rate of speed than 15 miles an hour. It was further alleged that said intersection of said street with Webster avenue and Royal avenue was then and there within the city limits of the City of Rockford. That appellant then and there carelessly, negligently and improperly ran, drove, managed, operated and controlled one of its said cars along and upon said track in violation of said ordinance of said city at a greater rate of speed than 15 miles an hour and that by and on account of said negligence, carelessness and improper conduct of appellant through and by its

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is true of the United States as a whole, and also of the individual States. The majority of the population of the United States is of European descent, and this is true of the individual States. The majority of the population of the United States is of European descent, and this is true of the individual States.

servants, the said street car, run upon and against appellee and threw her to the ground and pavement whereby appellee suffered great injury to her head, arms, body and limb and that she had been greatly injured and damaged thereby.

There are but two errors urged by appellant for a reversal of the judgment rendered in this cause. The first is that at the time and immediately before the receiving of the injury the evidence does not show appellee was in the exercise of due care and caution for her own safety. The second error assigned and argued is with reference to the first and second instructions given on behalf of appellee.

It is shown by the evidence that on the evening of June 1, 1920, at about six o'clock the appellee, a young lady, was going home from her work in the Pearl laundry in the City of Rockford, in an automobile belonging to the laundry company and driven by a man by the name of Nelson. It was misting rain. The automobile in which appellee was riding travelled west on State street, in the City of Rockford. The driver sat on the left hand side and appellee on the the right hand side of the automobile in question.

In west State street over which the automobile was driven in which appellee was riding, there were street car tracks over which cars were operated and the automobile travelled behind a certain street car until it reached the intersection of Webster avenue and Royal avenue with west State street where the street car stopped to let off passengers and the automobile stopped behind the street car. Some of the passengers got off of the car at the front end thereof and went around in front of the car and turned south. Others left the car at the rear end and passed around the car to the south. Appellee lived about 150 feet south of the intersection of west State street and Webster avenue. When the car started up and moved westward Nelson started the automobile and turned to the left, or south, for the purpose of going south on Webster avenue. When he reached the middle of the south or east bound track a street car going east and moving, it is alleged, at a high rate of speed and struck the automobile

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There are two types of appeals: one is a request for a review of the decision of the lower court, and the other is a request for a new trial. The first type is called a "writ of certiorari" and the second type is called a "writ of habeas corpus".

It is a very common mistake to suppose that the only way to get the most out of a book is to read it straight through from beginning to end. This is not necessarily the best method. A more effective way is to read the book in a more selective manner, focusing on the parts that are most relevant to your needs. This can be done by skimming the table of contents, the introduction, and the conclusion, and then reading the chapters that are most relevant to your needs. This method can save a great deal of time and effort, and it can also help you to focus on the most important parts of the book.



in which appellee was riding and she was thereby injured.

The testimony is conflicting as to the rate of speed at which the east bound car was going at the time appellee was injured. and as to whether or not any warning was given as it approached Webster avenue. On the part of appellee there is evidence to the effect that the east bound car as it approached the point of injury, was travelling from 22 to 27 miles an hour. On the part of appellant the evidence tends to show that the car moving east as it approached Webster avenue was travelling at the rate of from 10 to 15 miles per hour.

There is evidence also in the record that no warning was heard coming from the car going east as it approached the place where the injury was occasioned; also there is testimony to the effect that a signal was given as the car approached Webster avenue.

The motorman in charge of the car that came in contact with the automobile had been in the employ of the appellant about one month. No one was helping him to run the car at the time in question. He had no regular run.

Nelson, the driver of the automobile, testified that he could not see the street car coming from the west for the reason that his automobile was behind the street car which had stopped at Webster avenue. That the track was obstructed by the car in front of him travelling west and that he did not see the car moving east until immediately before it struck him and came in contact with the automobile. Appellee testified that she did not see the street car coming from the west because of the view being obstructed by the west bound car. Following the movement of the west bound car the driver of the automobile started it and that immediately after they turned south on Webster avenue the collision happened and she became unconscious

Whether Nelson, who was in charge of the automobile, was guilty of contributory negligence or not was a question of fact for the jury. We are not prepared to say that the evidence shows that he ~~failed~~ <sup>failed</sup>, immediately before and at the time of the collision, to

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exercise due care and caution for himself and for the safety of his automobile. Regardless of the question as to whether the driver of the automobile was in the exercise of due care and caution for his own safety, and even conceding that he was guilty of negligence in driving his automobile on the east bound track, such negligence would not be imputed to the appellee under the facts in this case. It certainly could not be said that even though the driver was guilty of negligence that that would preclude a recovery on her part unless it was his negligence alone that occasioned the injury. This is not claimed to be the fact by the appellant.

We are of the opinion that the evidence shows that appellee was doing exactly what any other reasonably prudent person would have done under like circumstances. She had no control over the driver and neither she nor the driver having observed the approaching car from the west on account of the street car in front of them and in connection with all other facts and circumstances as are disclosed in this record, the evidence is sufficient to establish the allegation of the declaration that she was in the exercise of due care and caution for her own safety immediately before and at the time of receiving the injury. There was no such relation between the driver of the automobile and appellee that his negligence could be imputed to her. We understand the rule to be that in the absence of some special relationship negligence of one person can not be imputed to another.

There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or of principal and agent.

Nonn vs. Chicago Railway Company 232 Ill. 378-381

Whatever may be the doctrine of some of the earlier cases in other jurisdictions, not only our own recent decisions but the great weight of authority, is to the effect that where a person injured is without fault and has no authority over the driver of a private conveyance, the negligence of the latter can not be imputed to the injured person so as to defeat the recovery against a third party for the con-

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There are no other persons who are known to be involved in this case.



curring negligence of the driver and such third party.

Nenn vs. Chicago City Railway Co. 232 Ill. 381-382

The negligence of the driver in sole charge of a vehicle can not necessarily be imputed to a passenger in the vehicle.

Swanlund vs Rockford Railway Company 305 Ill. 339-346

Before the appellee could be said to have been guilty of contributory negligence it must appear, that she failed to look after her own interests and safety, after having learned of a threatened accident, and has an opportunity to avoid it.

Swanlund vs Rockford Railway Company 305 Ill. 339-346.

Nothing has been pointed out by appellant to indicate that appellee failed in any manner to look after her safety upon the approaching of the east bound car. The jury has found that appellee was in the exercise of due care and caution for her own safety immediately before and at the time she received the injury for which this suit was instituted. Such finding of the jury has received the approval of the trial court, and we think properly so.

It is insisted by appellant that the first and second instructions given on the part of appellee are erroneous. The first instruction complained of informed the jury that the burden of proof was upon the plaintiff to prove her case as charged in her declaration or one count thereof by a preponderance of the evidence. It is said by appellant that this instruction is misleading. That it leaves the jury to determine and to decide as a matter of law what her case was as charged in the declaration.

The fourth instruction given on the part of appellant told the jury that the plaintiff is required by law to establish her case against the defendant company as charged in her declaration or one count thereof, by a preponderance of the evidence. It will be observed that the fourth instruction of appellant announced the same rule substantially as was found in the first instruction of appellee, therefore appellant is not in a position to complain of the action of the court in giving the instruction complained of in this instance.

... after that, he would not be considered a prisoner.

347-710, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023

10. After 1965, the number of cases declined sharply.

The second instruction given on the part of appellee also calls the attention of the jury to the charge as set forth in the declaration or some count thereof, and for this reason among others it is said by appellant that it is bad. By referring to the fifth instruction given on the part of appellant we find that the jury was instructed that the burden of proof was not upon the defendant company to show that it was not guilty of the specific negligence charged in the declaration. Again we find that the same element complained of in appellee's second instruction is found in appellant's fifth instruction. If there was any error in giving the first and second instructions on the part of appellee, appellant has fallen into the same error and therefore can not complain. Even though if appellant had not called attention of the jury to the declaration in its instructions still the errors complained of in appellee's instructions, if errors they may be, would not work a reversal of the judgment because the court gave an instruction of its own motion informing the jury what the particular charges were as set forth in the two counts of the declaration. Other criticisms are made of the instructions given on the part of appellee, but no serious error has been pointed out to any or either of them. The instructions given on the part of appellee and appellant when considered as a series fully informed the jury of the law of the case, and no fatal error was committed in the giving or the refusal of instructions.

After careful consideration of the record in this cause we are of the opinion that no reversible error appears and that the judgment of the Circuit Court should be and is affirmed.

Judgment affirmed.





STATE OF ILLINOIS, }  
SECOND DISTRICT. }

ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court.  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
Apr. in the year of our Lord one thousand  
nine hundred and twenty- three

*Justus L. Johnson*  
Clerk of the Appellate Court.



44  
7139 (3)  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff. 222

BE IT REMEMBERED, that afterwards, to-wit: on  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





William Mathewson, appellee,

vs

Appeal from the Circuit

John H. Smith, appellant.

Court of Livingston County.

Jett, J.

The appellee, a contractor, erected a house for appellant on a farm near the city of Pontiac, under plans and specifications prepared by an architect and under a written contract. Upon the completion of the building appellant, expressed dissatisfaction with reference to the manner in which a part of the work was done and refused to pay the balance claimed by appellee to be due. Appellant demanded of appellee that he deduct from the contract price certain sums to compensate him for money he was compelled to lay out in and about completing the house, and for damages sustained by reason of delay in the completion of the building.

On August 27, 1919, the architect issued a final certificate on the building and certified that appellee, was entitled to a payment of \$979.25. Negotiations were had relative to a settlement of their differences but no agreement was reached. On April, 24, 1920, appellee began suit for the balance claimed to be due under the contract. The cause was brought to the May term 1920. It was not reached for trial at the May term, 1920, nor at the October term of said year. At the January term, 1921, appellant filed a plea of the general issue supported by an affidavit setting up the nature of his defense, and a continuance was granted him to the May term 1921.

No trial was had at the May term, 1921, nor at the October term, 1921, but was set for trial at the January term, 1922. The appellant was an old man and in poor health. At the January term, 1922, appellant filed his affidavit for a continuance supported by the affidavit of a physician showing that it would not be safe for him



to leave his home during the winter weather and that it was necessary for him to be present upon the trial of the case and asking that the cause be continued to the May term, 1922. This motion to continue to the May term, 1922, was denied but the case was passed and set for hearing at a later date. This affidavit for a continuance was filed the 14th of February 1922. On the day the case was finally called for trial which was March 22, 1922, appellant asked leave to file an additional affidavit which was denied. The additional affidavit contained no new matter which was not set forth in the other affidavits but simply stated that it was necessary for him to be present during the trial and in order that he might testify in his own behalf and to advise his attorneys.

The first assignment of error is on the action of the court in denying a continuance. This cause of action had been pending for almost three years. The evidence discloses that most of the work under the contract was done under the supervision of appellant's son.

The affidavit for continuance was not sufficient for the reason that it stated the conclusions of the affiant and did not state facts. It was not such an affidavit that could have been admitted by appellee so that he could proceed with the trial.

The additional affidavit sought to be filed on the day of the trial came too late and it stated conclusions and did not state any fact or facts that were not contained in the prior affidavits.

The affidavits at the January term, 1921, and at the January term, 1922, were practically the same being almost identical, one being substantially a copy of the other. If it was true appellant was in such a physical condition that he could not attend the trial he could have had his deposition taken. No suggestion of this, however, appears in the record. The appellee was entitled to have a reasonably speedy trial, and if the trial was not had before the death of the appellant appellee would be prevented from testifying to the material facts in the case.

to leave his home during the winter weather and that it was not possible  
for him to be present at the trial of the case and asking that the  
case be continued to the May term, 1921. This motion to continue  
to the May term, 1921, was denied but the case was removed and set for  
hearing at a later date. This affidavit for a continuance was filed  
the 14th of February 1921. On the 21st the case was finally called  
for trial which was March 22, 1921, opposition being made to this and  
additional affidavits which were denied. The additional affidavits  
contained no new matter which was not set forth in the other affidavits  
but simply stated that it was necessary for him to be present during  
the trial and in order that he might testify in his own behalf and to  
advise his attorney.

The first assignment of error is on the motion of the court  
in denying a continuance. This cause of action was then pending  
for almost three years. The evidence showed that most of the work  
under the contract was done under the supervision of respondent's son.  
The affidavit for continuance was not sufficient for the  
reason that it stated the continuance of the trial and did not state  
facts. It was not such an affidavit that could have been admitted  
by the court as this he could proceed with the trial.

The additional affidavit sought to be filed on the 21st of  
the trial some two days later and it stated conditions and did not state  
any facts or facts that were not contained in the other affidavits.

The affidavit at the January term, 1921, and at the January  
term, 1922, were practically the same with slight variations, the  
being substantially a copy of the other. It is well known that  
was in such a physical condition that he could not attend the trial he  
could have had his deposition taken. He requested to do this, however,  
appeared in the record. The motion was denied and a continuance  
was never taken, and if the trial was not held before the death of the  
applicant would be prevented from testifying in the matter  
there in the case.



We are of the opinion the motion for a continuance was properly over-ruled. After the motion for a continuance was denied and the trial entered upon the appellant did not appear in person not by counsel. Counsel for appellant took no part in the trial. A jury was called, the evidence heard and at the close of the evidence the court directed a verdict in favor of appellee for \$1105.05 being the amount of the certificate of the architect and interests thereon. Appellant insists that the court was without authority to direct a verdict. The appellant was not present during the trial, made no objections to the directing of the verdict and is in no position to raise that point in this court, and although if objections had been made the evidence was to the effect that the amount was due and unpaid and but one conclusion could be drawn from the evidence and therefore the court was justified in directing the verdict.

It is also claimed by appellant that the Exhibits offered in evidence were not read to the jury. We do not know the source of appellant's information in this respect. The abstract shows that the Exhibits were admitted in evidence and without any proof to the contrary we think we can infer and have the right to do so that the Exhibits were read and that all of the requirements of the law were complied with.

The abstract filed in this case on behalf of appellant is not in accordance with the rules of this court, and all the evidence is not fully abstracted. Appellant was content by merely reciting that on a certain page or pages of the record would be found certain testimony. The contract and specifications under which the building was erected do not appear in detail in the abstract, and it is impossible for us to pass intelligently on the complaints made by appellant.

For the reasons indicated the judgment of the court below will be affirmed.

Affirmed.

As one of the parties the motion for a continuance was properly over-ruled. After the motion for a continuance was over-ruled and the trial resumed the defendant did not appear in court. Not by counsel. Counsel for defendant took no part in the trial. A jury was called, the defendant being one of the jurors of the venire. The court allowed a verdict in favor of plaintiff for \$100.00 being the amount of the certificate. The defendant and his counsel. Defendant insists that the court was without authority to make a verdict. The defendant was not present during the trial, and no objection to the verdict. The verdict was in no way objectionable to the plaintiff in this court, and although it is objectionable to him the defendant was so the effect that the court was and had made the defendant could be taken from the evidence and might and not any objection could be taken from the evidence. It is also claimed by defendant that the verdict is illegal in evidence was not read to the jury. He does not know the contents of defendant's instructions in this respect. The defendant claims that the exhibits were admitted in evidence and without any objection to the contrary he thinks he was later and gave the right to do so that the exhibits were read and that all of the requirements of the law were complied with.

The objection filed in this case on behalf of defendant is not in accordance with the rules of this court, and all the witnesses in this case were sworn to by the court and the defendant. That on a certain page or pages of the record would be found certain testimony. The witness and a professional witness who was the witness was sworn to by the court in the witness, and it is the testimony of the witness that the witness was in the witness.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
Apr. in the year of our Lord one thousand  
nine hundred and twenty- three

Justus L. Johnson  
Clerk of the Appellate Court.





## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS A. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

229-1-685

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BE IT REMEMBERED, that afterwards, to-wit: on  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



Godfrey Johnson v.

vs.

Ida O. Crouch, et al,

---

Minnie Rosenberger,

Cross Complainant and Appellant,

vs.

Appeal from Lake

Godfrey Johnson,

Cross Defendant and Appellee,

Jett, J.

Upon the dissolution of a temporary injunction in obedience to the mandate of this court, issued because of a decision rendered on the 23rd day of February, 1922, in the suit of Minnie Rosenberger cross complainant against Godfrey Johnson cross defendant, a suggestion of damages was filed by the cross defendant and appellee Godfrey Johnson, in the Circuit Court of Lake County. A hearing was had upon the suggestions, but before the hearing was entered upon appellant entered a motion to continue the assessment of damages until the main case could be heard. This motion of appellant was by the court denied, and the court heard evidence as to the damages sustained on account of solicitors fees and expenses in securing the dissolution, and entered a final decree thereon, the amount allowed for solicitors fees being \$375., and referred the remaining suggestions of damages, to the special master for the purpose of taking evidence in the original or main case and to report such damages to the court. From the decree rendered by the chancellor this appeal is prosecuted.

It appears that Godfrey Johnson, appellee, originally filed a bill in the Circuit Court of Lake County, in which the possession and title to certain real estate was involved, and in said cause Ida O. Crouch and others were made defendants. There is nothing in this record to indicate just who the defendants were, but it appears that

Celtic Journal, v.

1911

The Celtic Journal, v.

Celtic Journal, v.

The Celtic Journal, v.

The Celtic Journal, v.

1911

Celtic Journal, v.

The Celtic Journal, v.

1911

Upon the decision of a temporary injunction in substance  
of the merits of this case, issued because of a decision rendered

of the 21st of February, 1911, in the case of the  
Celtic Journal, v. The Celtic Journal, v.

and the suggestion of the Celtic Journal, v. The Celtic Journal, v.

and the suggestion of the Celtic Journal, v. The Celtic Journal, v.

and the suggestion of the Celtic Journal, v. The Celtic Journal, v.

and the suggestion of the Celtic Journal, v. The Celtic Journal, v.

and the suggestion of the Celtic Journal, v. The Celtic Journal, v.

and the suggestion of the Celtic Journal, v. The Celtic Journal, v.

and the suggestion of the Celtic Journal, v. The Celtic Journal, v.

and the suggestion of the Celtic Journal, v. The Celtic Journal, v.

and the suggestion of the Celtic Journal, v. The Celtic Journal, v.



Minnie Rosenberger was one of the defendants in said suit. It also appears that Minnie Rosenberger answered in said cause and filed a cross bill making Godfrey Johnson a defendant in the cross bill and obtained an injunction against the said Godfrey Johnson, in and by which the said Godfrey Johnson was restrained from the use and occupation of certain buildings in said cross bill mentioned and described.

A motion was made by Godfrey Johnson, the cross defendant, to dissolve the temporary injunction and on hearing the motion to dissolve was denied. An appeal was prosecuted to this court and the decree of the Circuit Court was reversed and remanded with directions to dissolve the temporary injunction, and the Circuit Court, as directed by the Appellate Court, entered an order dissolving the injunction and the said Godfrey Johnson, cross defendant as aforesaid, made a suggestion of damages which he claimed to have sustained by reason of the wrongful suing out of the injunction. The suggestion of damages included items for solicitors fees and for services in the preparation of the record and abstract and brief in the Appellate Court and for services in and about securing the dissolution of the writ of injunction, together with other items of necessary expenses which were occasioned in preparing the case to be heard before the Appellate Court. The motion for suggestion of damages also included certain items and sums of money for loss of rent of buildings which the said Godfrey Johnson had been restrained from the use and occupation of together with moneys which said Godfrey Johnson was obliged to refund to certain tenants.

It is suggested that no transcript of the record, as is required by statute, has been filed in this court. In view of the conclusion we have reached, it will not be necessary to discuss this suggestion.

The following is the language of the decree appealed from that embodies the only exception entered by Minnie Rosenberger, the cross complainant and appellant herein and is as follows:- "And now

1  
The following is the list of the names of the persons who were present at the meeting of the Board of Directors of the American Telephone and Telegraph Company, held on the 15th day of January, 1901, at New York City, New York.

A motion was made by Colver Johnson, the clerk present, to adjourn the meeting until the next day, to be held at the same place. The motion was seconded by the same person, and carried. The meeting was adjourned until the 16th day of January, 1901, at New York City, New York.

The suggestion of Colver Johnson, the clerk present, to adjourn the meeting until the next day, to be held at the same place, was seconded by the same person, and carried. The meeting was adjourned until the 16th day of January, 1901, at New York City, New York.

The following is the list of the names of the persons who were present at the meeting of the Board of Directors of the American Telephone and Telegraph Company, held on the 16th day of January, 1901, at New York City, New York.

The following is the list of the names of the persons who were present at the meeting of the Board of Directors of the American Telephone and Telegraph Company, held on the 17th day of January, 1901, at New York City, New York.

comes the cross complainant Minnie Rosenberger and excepts to the order of the court overruling her motion to postpone the assessment of damages upon the dissolution of the temporary injunction herein, and the cross complainant Minnie Rosenberger prays the court to grant an appeal from the decree assessing damages for a portion of the suggestion of damages, and referring the remainder of the suggestion of damages to the special master in chancery to take the proof thereon." Appellants only complaint preserved in the decree in the lower court is, not that the damages allowed in the decree are in any manner unwarranted but excepts because the trial court refused to postpone the assessment of damages upon the dissolution of the temporary injunction and prays an appeal therefrom.

It will be observed from the decree that the court found that it would practically mean the trial of the merits of the original case on the issue involved in the main suit to determine what if any damages had been sustained by appellee by reason of being restrained from the use and occupation of certain buildings.

These alleged damages if any, it seems will depend entirely on the result of the original suit. Whether they do or not is no reason why appellee should not be allowed to have his damages assessed that have accrued and are ascertained and occasioned by the wrongful suing out the injunction, and in securing its dissolution.

No exception was entered to the assessment of the damages of \$375. by way of solicitors fees. The complaint, preserved in the decree goes to the refusal of the postponing the assessment of damages. The assessment of damages was a final and appealable order. We are not prepared to so hold as to that part of the decree to which the exception was entered. The appellant prayed an appeal from the decree assessing the damages, and argues the case that the court should not have rendered the decree for solicitor's fees.



...the cross complainant's statement and the fact that the  
order of the court directing the action to postpone the assessment  
of damages was the basis of the temporary injunction granted.  
The cross complainant's statement that the court could so  
grant an appeal from the decree assessing damages for a portion of  
the damages is correct, and that the remainder of the  
damages is subject to the special master's report is also  
correct. The court's only complaint is that the  
court in the lower court is, not that the damages allowed in the  
decree are in any way unbalanced but that the damages are final  
and cannot be reopened. The assessment of damages upon the  
basis of the temporary injunction and the appeal from  
the decree is correct. It will be correct from the decree that the court found that  
it was unbalanced and the fact of the decree of the court  
that the issue involved in the main was to determine what  
the damages had been awarded by appeal by reason of being  
satisfied from the fact and completion of certain findings.  
The court's finding is that, if there will be any finding  
on the result of the original suit. The court may or may not  
be satisfied that the damages had been allowed to have the damages  
assessed that have been assessed and the damages are assessed by  
the original order and the injunction, and the court is the  
court.

...No objection was made to the assessment of the damages of  
the court of the original decree. The complaint, however, in the  
decree was to the extent of the assessment of the damages of  
the court. The assessment of damages was a final and binding  
decree. It was not subject to be held as a part of the  
decree to which the objection was made. The complaint was  
an appeal from the decree assessing the damages, and the court  
was not the court which had assessed the damages.

...The court's finding is that, if there will be any finding  
on the result of the original suit. The court may or may not  
be satisfied that the damages had been allowed to have the damages  
assessed that have been assessed and the damages are assessed by  
the original order and the injunction, and the court is the  
court.



We are not inclined to be technical in the premises, and as both the appellant and appellee have argued the merits of the cause, we will decide the case as though the proper and necessary exceptions had been preserved.

It is insisted that no showing was made by which appellee has become liable for solicitors' fees in obtaining the dissolution of the injunction. The record discloses the fact that Fla, Grover & March, together with Justin K. Orvis, were the solicitors for appellee in the original case and also that they were the solicitors who prosecuted the appeal from the order granting the injunction without bond and without notice, and were solicitors for appellee in this court when the order of the court below was reversed. The testimony shows that Orvis, was engaged as associate counsel; that he was paid a retainer fee, and of appellee being repeatedly at his office and consulting him.

Taking into consideration the fact that the services were rendered; that appellee received the benefit of the same; that the service was rendered with the knowledge, aid and assistance of said appellee, we are of the opinion that the showing is sufficient to establish the fact that the appellee has become liable to pay and that a liability has been established by the evidence. In reply to the suggestion of appellant, that when two solicitors are employed in obtaining the dissolution of an injunction, damages should not be assessed for more than what would appear to be a reasonable fee for one solicitor, the record does not show that separate fees were asked nor is it shown that separate fees were allowed. The amount of the fee allowed was for services rendered by the solicitors and were for services strictly pertaining to the dissolution of the injunction. The sum allowed by the chancellor disapproves the suggestion of a double charge or fee.

The remaining question is whether or not the assessment of damages for solicitors' fees for services in securing the dissolution of the temporary injunction should be allowed before the merits of the original bill are passed upon, it being contended by

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive one.

[illegible]

Very truly yours,  
J. Edgar Hoover

1. The following information is being furnished to you for your information and is not to be used for any other purpose. It is being furnished to you for your information and is not to be used for any other purpose. It is being furnished to you for your information and is not to be used for any other purpose.

the appellant such assessment of damages is premature. Section 12 of the injunction act provides as follows: "In all cases where an injunction is dissolved by any court of chancery in this State, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damaged by such injunction, and may award execution to collect the same: Provided, a failure to assess damages shall not operate as a bar to an action upon the injunction bond."

While there appears to have been a conflict in the earlier decisions on this question, an examination shows such to have been due to the different statutes in force at the time of such decisions. The rule in this State has always been that where a temporary injunction is ancillary to the cause of action, damages may be assessed upon the dissolution of a temporary injunction without disposing of the merits of the bill.

The People ex rel Thrasher vs. Eisenberg, 283 Ill. 304, 308, 309.

We are of the opinion ~~that~~ after considering all of the suggestions made by appellant that the action of the court in assessing the damages is sustained by authority. We therefore conclude that the decree of the court below should be affirmed which is accordingly done.

Affirmed.





STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
Apr. in the year of our Lord one thousand  
nine hundred and twenty- three

*Justus L. Johnson*  
Clerk of the Appellate Court.



7151 (3888)  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff. 229 1. 805 4

BE IT REMEMBERED, that afterwards, to-wit: on  
MAK the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:

July 27<sup>th</sup> 1896 at the same place.

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J. C. Murchison, appellee,

vs

J. H. Baird, appellant.

Appeal from the Circuit Court  
of Knox County.

Jett, J.

Appellee, J. C. Murchison, brought suit in the Circuit Court of Knox County, against J. H. Baird, appellant, to recover commissions he claimed were due him from appellant by reason of his being instrumental and the moving cause in the making of a trade in and by which appellant disposed of a large body of land he owned in the State of Kansas and in Canada.

The cause was submitted to a jury, and there was a verdict for appellee assessing his damages. Motion for a new trial made by appellant, was denied and judgment rendered on the verdict of the jury from which judgment this appeal is prosecuted. Neither the verdict of the jury, the judgment, the motion for a new trial nor the assignment of errors are abstracted. The record discloses however, that the judgment rendered was for \$1852.

The evidence shows that the appellant was the owner of a large body of land in Canada and some land in the State of Kansas, which he desired to sell or trade. It is the contention of appellee that appellant placed this land in his hands for sale and trade and as a result he secured a trade with one W. C. Gunn, for 440 acres of land in Pike County, Illinois, and that appellant was to pay a difference of \$28,800. It is urged that the Court was in error in admitting in evidence Exhibits "2" and "3", which were the contracts for the exchange of the land by the appellant and Gunn.

The objection is based on the fact that the instruments were signed by John Connor, as agent for Gunn, and that Connor had no authority nor right from Gunn to sign these instruments and therefore they did not constitute valid contracts for the exchange of said lands.

J. W. Thompson, Plaintiff,

vs

James Thompson, Defendant.

of New York.

J. W. Thompson, Plaintiff.

Test, &c.

Appellee, J. W. Thompson, Plaintiff, in the Circuit

Court of New York, against J. W. Thompson, Defendant, in the

complaint he claimed that his own complaint of the Court of New York

being instrumental and the moving cause in the making of a deed in

and by which appellee's interest in the State of New York was transferred

the State of New York and in Canada.

The case was submitted to a jury, and there was a verdict

for appellee against his plaintiff. Motion for a new trial was

appellee, and motion and judgment rendered in favor of the jury.

from which judgment this appeal is presented. Before the trial

of the jury, the judgment, the motion for a new trial and the

assignment of errors are submitted. The record discloses, however,

that the judgment rendered was for \$1000.

The evidence shows that the appellee was the owner of a

large tract of land in Canada and was dead in the State of New York,

which he desired to sell or lease. It is the contention of appellee

that appellee's interest in the land was sold to him and that he

as a result he secured a deed with one J. W. Thompson, for the sum of

one hundred dollars, which, was then presented to the jury as a

testimony of \$10,000. It is alleged that the deed was in fact a

deed in evidence before the jury, and that the jury was

for the purpose of the land by the appellee and his

The appellee is asked to show that the judgment is

against the plaintiff, and that the motion for a new trial

was granted and that the judgment was reversed and the

case remanded to the Circuit Court of New York for a new trial.

If they were the only points of controversy in this case we would be compelled to hold that the two Exhibits were not executed as provided by law, but the exhibits are merely incidental to the proofs of the trade that were subsequently acted upon and for that reason were not controlling.

Objection is also made to the action of the Court in permitting the appellant to testify to the contents of a letter or telegram sent to him by Gunn, which letter or telegram is alleged to be in confirmation of the two contracts, represented by Exhibits "2" and "3". The appellant was called as a witness for appellee and was asked concerning the letter or telegram which he received from Gunn. He testified that he had received such a letter or telegram but said that he did not know where it was. Appellant was given an opportunity to go to his office and search for it but the search was unsuccessful and thereupon the Court ruled that appellant might testify to its contents in which he stated that he thought it approved the contract.

The record discloses that the answer was made before any objection was entered and there was no motion to strike the answer. The evidence itself was in a measure immaterial and did not constitute Court improperly admitted it. It is next insisted that the contract of exchange of lands was not valid and binding for the reason that the title to the land to be conveyed to the appellant was not in Gunn but was in a man by the name of Irwin, and that the trade was never consummated. The evidence shows that while the title was in Irwin the deeds of conveyance were executed by him conveying the land directly to the appellant and these deeds were deposited in the bank. The evidence also shows that the appellant paid to Gunn \$10,000 in cash as a part of the \$28,800., provided for in the contract and that he entered into possession of the land traded for and made improvements thereon.

Under these facts we are of the opinion the evidence was sufficient to show that the trade was consummated. The appellee





testified in his own behalf as did the appellant and each gave his version of what was said and done as tending to prove or disprove a contract. A number of witnesses were examined on the part of appellee and the testimony is to some extent conflicting. If the jury believed the contention of appellee they had a right to find as they did. There is no claim made in the argument by appellant as to the weight of the evidence concerning the contract between appellee and appellant, and the only reasons urged for reversal are the ones above considered.

We are, therefore, of the opinion that no reversible error has been pointed out and that the judgment of the Court below should be affirmed, which is accordingly done.

Judgment affirmed.

testified in his own behalf as all the witnesses and also gave his version of what was said and how he felt at the time of the trial.

contact. A number of witnesses were contacted on the part of

appeals and the testimony is as was stated previously. It is

not believed the conviction of appeals that was a right to him as

they did. There is no claim made in the argument by appeals as to

the weight of the evidence because the contact between appeals

and appeals, and the only reasons given for reversal are the ones

which are considered.

as are, therefore, of the opinion that no reversible error

has been pointed out and that the judgment of the court below should

be affirmed, which is respectfully done.

Respectfully,  
 [Signature]

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
Apr in the year of our Lord one thousand  
nine hundred and twenty-three

Justus L. Johnson  
Clerk of the Appellate Court.





7157 (2341)  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



Walter Smith, appellee,

vs.

Appeal from the Circuit Court

W. W. Lair and W. C. Dilley  
appellants,

of Mercer County.

Jett, J.

The appellee began an action of assumpsit before a justice of the peace against appellants and obtained judgment for \$143.25. An appeal was prosecuted to the circuit court of Mercer County, where there was a trial by jury and judgment in favor of appellee for \$157.09 and an appeal from that judgment was prosecuted to this court.

The action was commenced by the appellee to recover money claimed to be due him from the appellants for the care, training and cash paid out on a horse known as, "Society Leader" owned by the appellants. No brief and argument has been filed on behalf of the appellee. Rule 31 of this court provides the time within which briefs and arguments shall be filed on behalf of appellee, and it is further provided that if they are not so filed, the judgment will be reversed pro forma on the call of the docket unless on an examination of the record the court shall deem it proper to decide the case upon its merits.

From an examination of the briefs filed on behalf of appellants we see no reason why the court should decide this case on its merits and on account of the failure of appellee to file his brief the judgment will be reversed pro forma.

*Reversed pro forma and remanded.*

W. H. Davis and W. J. Davis

W. H. Davis and W. J. Davis  
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STATE OF ILLINOIS, {  
SECOND DISTRICT. ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
Apr. in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.



7177. (3) 14-10-1906

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS A. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff. 229 1A. 626

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BE IT REMEMBERED, that afterwards, to-wit: on  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





Frank C. Lake  
Appellee,

vs

Appeal from the Circuit  
Court of Iroquois County.

Frank J. Hennessy,  
Appellant.

Jett, J.

Appellee, Frank C. Lake, filed a bill in the Circuit Court of Iroquois County against Frank J. Hennessy and Merna Ross Pruett, administrator, in which he prayed to be subrogated to the rights of said Merna Ross Pruett administrator as aforesaid in a certain judgment against appellee Lake, appellant Frank J. Hennessy and others and also for an accounting. The said Merna Ross Pruett, administrator, disclaimed any interest in the suit. Appellant plead to the jurisdiction of the court and his plea having been overruled he filed an answer in and to which he denied all of the material allegations of the bill of complaint. Replication was filed and a hearing was had, at the conclusion of which a decree was rendered in favor of appellee, from which appellant prosecutes this appeal.

In the summer of 1919, one Lou G. Spies was appointed executor of the last will and testament of John C. Pruett, deceased, by the County Court of Kankakee County, and as such executor entered into bond in the penal sum of \$60,000 with appellant Hennessy and H. P. Sykes as sureties. Some time later Spies resigned as executor, and at the time of his resignation he had in his hands, and was indebted to the pruett estate in the sum of \$5304.

The said Merna Ross Pruett was appointed administrator with the will annexed of the estate of the said Pruett, deceased, upon the resignation of said Spies. Pruett, administrator, demanded payment of the said sum due the estate from Spies and called upon Spies and his sureties appellant Hennessy and Sykes for settlement. Hennessy became greatly excited and informed his co-surety H. P. Sykes that

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something had to be done in regard to securing this sum of money Spies had belonging to the estate. Appellant said he was afraid they would jump on the property of himself and Sykes. The administrator was willing to accept a note for the said sum of \$5304 to be given by Spies, Hennessy and Sykes due in thirty days.

When this suggestion was submitted to appellant he declined to sign the note for thirty days and wanted more time and additional security. The note was then changed to mature in ninety days and was signed by Spies and turned over to appellant. Appellee Lake, was a farmer residing near Chebanse, Illinois, a distance of about ten miles from Kankakee. After the note had been turned over to appellant by Spies, Spies called appellee from Kankakee by telephone and asked him to meet appellant at chebanse the following morning without telling appellee for what purpose. Appellee went to Chebanse the next morning and met appellant who explained to him about this indebtedness to the Pruett estate and requested appellee to join with him, Sykes and Spies in a ninety day note for the principal sum of \$5304, in favor of the administrator of the Pruett estate.

Appellee hesitated about signing the note as the matter was of no concern to him and appellant then told him that he was intending to take over or had taken over Spies's garage and was going to dispose of it and pay the note before it became due and appellee need not worry as he appellant, would see that Spie's gargge was sold in plenty of time to pay the note before maturity, and that the garage would sell for enough to pay the note in full. This conversation took place near the store of Sykes in Chebanse, and while appellee and appellant were talking, Sykes came along and appellant repeated in the presence of appellee and Sykes what he had previously stated to appellee.

Appellee, appellant and Sykes then signed the note, Spies having previously signed it in Kankakee.

It appears that Spies, Sykes and Hennessy were principals

... ..



in the note and appellee merely signed as surety for them. Appellee Lake, was a brother in law of Spies, and the sole inducement to him to sign the note was appellants assurance that he would pay the note out of the proceeds of the property of Spies which appellant had taken over.

Appellants objection to the signing of a thirty day note was based upon his fear that the garage of Spies could not be converted into money within thirty days. Previous to the time appellee signed the note in question Spies had turned over to appellant his entire garage including three new oakland automobiles, some second-hand cars, about 150 automobile tires, and a large stock of auto accessories, auto parts, machinery and tools, with the understanding between appellant and Spies, that it was to be sold and the first money realized was to be used to pay the Pruett estate. This property was worth between \$30,000 and \$40,000. It was admitted on the trial that the major part of the Spies garage was sold by appellant long before the note in question matured. Appellant did not pay the note and after its maturity the administrator with the will annexed of the Pruett estate, caused judgment to be entered against all of the signers thereof by Confession in the Circuit Court of Iroquois County.

An execution was issued on this judgment and levied upon the property of appellee. Appellee's farm was advertised for sale by the sheriff of Iroquois County for the purpose of satisfying the execution. No attempt was made to satisfy this execution out of the property of appellant or of any other of the parties to the note.

On the day the sheriff was to sell the farm of appellee, he paid the sheriff \$6123.70 being the amount called for by the execution. In order to raise the money to make this payment to the sheriff of said county, on the execution, appellee mortgaged his farm and paid a brokers commission of four percent and obligated himself to pay seven per cent on the money for which he mortgaged his farm. Some time after



appellee had signed the note and after it had been delivered to the administrator, appellant stated to his co-surety on the executors bond Sykes, that the lawyers would not permit him to apply any of the proceeds realized from the sale of the garage to the satisfaction of the Pruett note, and that he guessed it would be up to him and Sykes to make good the amount due the Pruett estate from Spies.

Appellant has at all times refused to apply any of the money or monies received by him from the sale of the Spies garage to the satisfaction of the Pruett indebtedness, and has refused to account to appellee for the monies received from the sale of the Spies garage and property, and has refused to reimburse appellee for the sum of money expended by him in satisfaction of said execution.

It will be observed that the appellant filed an answer to the bill and had a hearing, and submitted the question involved in the cause, and his defense to the bill to the decision of the chancellor, and having done so he is not in a position to say, for the first time in this court, that this was not a proper matter to submit to a court of equity.

In the case of Charles A. Street, et al vs. the Chicago Wharfing and Storage Company 157 Ill. page 611 the Court said, "Nor can the point now be made that appellee has an adequate remedy at law. Appellants answered the second amended bill and went to a hearing, and submitted the question of their rights to the decision of the chancellor. In cases that are not wholly foreign to the jurisdiction of a court of chancery, defendants cannot do this, and then, in the event the adjudications are adverse to their interests, claim that the complainants had adequate remedies in the court of law."

This proceeding is not wholly foreign to a court of equity. When appellant took over this property from Spies for the purposes for which he received it he held it in the character of a trustee and should be held to execute the trust.

appealed but signed the bill. It was then referred to the  
committee, and they reported it back to the house. The  
house then passed it, and it went to the senate. The  
senate then passed it, and it went to the president.  
The president then signed it, and it became law.

appealed and it was then referred to the  
committee. The committee then reported it back to the  
house. The house then passed it, and it went to the  
senate. The senate then passed it, and it went to the  
president. The president then signed it, and it became  
law.

It will be observed that the agreement was made  
in the city and not in the country. The committee  
then reported it back to the house. The house then  
passed it, and it went to the senate. The senate  
then passed it, and it went to the president. The  
president then signed it, and it became law.

In response to the bill, the committee  
then reported it back to the house. The house then  
passed it, and it went to the senate. The senate  
then passed it, and it went to the president. The  
president then signed it, and it became law.

THIS PROVISION IS NOT NEARLY AS GOOD AS THE  
ONE WHICH IS NOW IN THE BILL. THE COMMITTEE  
WAS NOT IN A POSITION TO MAKE A BETTER ONE.  
THEY WERE NOT IN A POSITION TO MAKE A BETTER ONE.



Express trust in personal property may be created by parol.

Dowland et al vs Staley 201, App. 6-7/

A trust is an obligation arising out of a confidence reposed in one who has the legal title to property conveyed him, that he will faithfully apply and deal with it according to the confidence reposed.

Allen vs Rees 136 Iowa 423-426.

8 L. R. A. N. S. 1137n

We have examined all of the suggestions made by the appellant why this decree should be reversed. We are of the opinion that appellee is entitled to be subrogated to the rights of Merna Ross Pruett administrator in the judgment, and that as the evidence shows that Hennessy received the proceeds of the sale of the garage property which should have been applied to the payment of the note in question, we are also of the opinion that appellee is entitled to an accounting from the appellant. Any other conclusion would sanction the perpetration of a fraud, not only upon appellee but upon Spies as well.

This is not a case, as appellant would have us believe, in which appellee is seeking contribution from the other makers of the note for their part of its payment, but is a bill in equity for subrogation and an accounting.

We are of the opinion that the weight of the testimony supports the material allegations of the bill, and that the decree of the Circuit Court should be affirmed.

Affirmed.

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STATE OF ILLINOIS, {  
SECOND DISTRICT. ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 3<sup>rd</sup> day of  
Apr in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.





7023

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

2297 A. 600 2

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



7032

William P<sup>3</sup> Hoy, as Receiver, etc.,

appellee,

vs.

Appeal from the Circuit

Charles E. Fairchild,

Court of McHenry County.

appellant.

Partlow, J.

This is an appeal from a judgment of the circuit court of McHenry county adjudging the appellant, Charles E. Fairchild, guilty of contempt of court and sentencing him to the county jail until such time as he or the Home Trust and Savings Bank of Elgin shall turn over to the appellee, as receiver, certain property.

All of the substantial questions and matters upon which the judgment against the appellant for contempt was rendered were disposed of by this court in the case of Brinkerhoff vs. Huntley, 223 Ill. App. 591, where we held that the circuit court of McHenry county had no jurisdiction of the subject matter or of the parties to the suit. Such being the case, the circuit court of McHenry county was without jurisdiction to enter the order adjudging the appellant guilty of contempt.

The judgment of the circuit court will therefore be reversed pro forma as provided in rule 31 of this court.

Judgment reversed.

THE

WILLIAM T. HALL, JR., as Defendant,

vs.

JOHN T. HALL, JR., as Plaintiff,

vs.

COUNTY OF HOLLYWOOD, California.

CHARLES F. HALL, Plaintiff,

vs.

San Jose, Cal.

There is an appeal from a judgment of the Superior Court of the County of San Diego, California, rendered on the 14th day of January, 1934, in the above entitled cause, wherein the plaintiff, Charles F. Hall, seeks to recover damages from the defendant, John T. Hall, Jr., for the wrongful taking of his property, to-wit: a certain parcel of land situated in the County of San Diego, California, and the same is being appealed to the Court of Appeals of the State of California.

All of the facts and circumstances of the case are set forth in the complaint filed by the plaintiff, Charles F. Hall, and in the answer thereto filed by the defendant, John T. Hall, Jr., and in the affidavits of the parties thereto, and the same are hereby incorporated by reference into this petition. The plaintiff, Charles F. Hall, alleges that the defendant, John T. Hall, Jr., wrongfully and unlawfully took from him a certain parcel of land situated in the County of San Diego, California, and the same is being appealed to the Court of Appeals of the State of California.

The judgment of the Superior Court of the County of San Diego, California, rendered on the 14th day of January, 1934, in the above entitled cause, is hereby appealed to the Court of Appeals of the State of California.



STATE OF ILLINOIS, }  
SECOND DISTRICT. }

ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
April in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.



706

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

219 : 1. 056

BE IT REMEMBERED, that afterwards, to-wit: on  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





Ora Rowe, Administratrix of the Estate  
of Sampson T. Rowe, deceased,

Plaintiff in Error,

vs.

Lewis R. Phillips, L. Edgar Jerome,  
Western Bankers' Trust Company,

Defendants in Error.

Error to the Circuit

Court of Marshall

County.

Partlow, J.

On September 19, 1916, Sampson T. Rowe began an action for fraud and deceit in the circuit court of Marshall county, against the defendants in error, Lewis R. Phillips, L. Edgar Jerome, and the Western Bankers' Trust Company, a corporation, to recover damages for the sale, by the defendants in error, to Rowe, of certain preferred and common stock of the Western Bankers' Trust Company alleged to be worthless. The declaration was amended several times, demurrers were filed, motions were made to strike parts of the pleadings from the files, but finally pleas were filed forming an issue in the case. On October 8, 1918, Phillips and Jerome made a motion to withdraw their pleas filed to the last amended declaration with leave to file a demurrer thereto. This motion was allowed, and on October 11, 1918, the demurrer was sustained to each count of the last amended declaration. Rowe elected to stand by his declaration. Rowe subsequently died, his death was suggested, the administratrix of his estate was substituted as plaintiff, and judgment in bar against her was entered. The administratrix prayed an appeal to this court where the judgment was reversed and the cause remanded. 214 Ill. App. 582. In that opinion this court held that certain counts of the declaration were good, and the cause was remanded with directions for further

Old House, Administration of the House of Representatives, of American House, Secretary, Secretary in Chief,

Report of the House

and

James A. Smith, Secretary, Secretary in Chief,

Secretary in Chief,

Secretary in Chief.

Section 6.

On December 19, 1935, James A. Smith began his service

for term and was in the office of the Secretary in Chief.

Against the Secretary in Chief, James A. Smith, Secretary in Chief,

and the Secretary in Chief, Secretary in Chief, Secretary in Chief,

James A. Smith, Secretary in Chief, Secretary in Chief,

certain matters of the House of Representatives, Secretary in Chief,

Company alleged to be Secretary in Chief, Secretary in Chief,

Secretary in Chief, Secretary in Chief, Secretary in Chief,

part of the Secretary in Chief, Secretary in Chief, Secretary in Chief,

James A. Smith, Secretary in Chief, Secretary in Chief,

James A. Smith, Secretary in Chief, Secretary in Chief,

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James A. Smith, Secretary in Chief, Secretary in Chief,

James A. Smith, Secretary in Chief, Secretary in Chief,

James A. Smith, Secretary in Chief, Secretary in Chief,

proceedings in harmony with the views therein expressed. Upon the remanding order being filed in the trial court, and order was entered setting aside the order giving the defendants in error leave to withdraw their pleas, together with the leave to demur to the last amended declaration, whereupon the demurrer of October 8, 1918, to the last amended declaration was overruled. The cause was then at issue. There was a trial by jury, a verdict finding Phillips not guilty, but finding that Jerome and the Western Bankers' Trust Company were guilty, and assessing plaintiff in error's damages at \$17,500.00. Motions for a new trial were made by Jerome, and by the plaintiff in error, both of which were overruled, and the plaintiff in error, as administratrix, has prosecuted and appeal to this court.

The first ground of reversal urged is that the court erred in not following the directions of this court and determine what counts of the declaration were good. When this case was before us on the former appeal, we considered all of the counts which had been filed to the declaration, about thirteen in number. We did not pass specifically on each of them but we did pass on some of them, and held some of them good, and we laid down the principles applicable to actions of this kind. The judgment was reversed with directions to the trial court, from the principles announced, to determine what counts of the declaration were good. Upon the cause being reinstated in the trial court, the plaintiff in error made a motion for an order setting aside the leave granted the defendants in error to withdraw their pleas and with leave to file a demurrer; also to set aside the order sustaining the demurrer; and praying that the court enter an order striking the demurrer from the files, declare the cause at issue upon the pleadings; and that the court take such other and further proceedings in the case as might be in compliance with the directions of this court as set forth in the remanding order. On January 2, 1920, the court allowed the motion of the plaintiff in error and entered the following order: "Now on this day, on motion of the plaintiff, it is ordered that the order heretofore entered in this





case giving defendants leave to withdraw pleas, and demurr to the amended counts of the declaration which were filed November 1, 1917, is set aside and vacated, also the order sustaining demurrer to said counts." This order does not appear in the abstract, and we have had considerable difficulty in determining just what motions were made in the trial court and just what leave was granted in the case. The plaintiff in error now insists that the trial court should have determined specifically which counts of the declaration were good under the rules laid down by this court, and that the cause should have proceeded to trial upon all of the good counts. If the plaintiff in error desired to have a specific ruling on each count, she should have made such further request of the court. Our attention has not been called to any place in the record where any further request was made. The court granted the only motion plaintiff in error made, and after that motion was granted, the cause was at issue just as it had been in October, 1918, before the demurrer was sustained. Apparently plaintiff in error was willing to go to trial on the declaration without further motions. From the beginning of the suit until the day of trial, thirteen counts of the declaration were filed. There were five counts upon which plaintiff in error finally went to trial. We think these five counts contain every allegation of the declaration found in the other eight counts, and even more than was alleged in them. No evidence was excluded because there was no allegation of the declaration on which to base the evidence. Even if the court did not pick out each count which might have been held good under the rules announced by this court in its prior decision, no injury was done to the plaintiff in error on that account.

It is claimed by the plaintiff in error that during the trial, over the objections of the plaintiff in error, the court permitted counsel for Phillips to make objections on behalf of Jerome, permitted counsel for Jerome to make objections on behalf of Phillips, and each tried the case for the other; that two



cross-examinations were permitted of each witness called on behalf of plaintiff in error; and that other alleged errors were committed in this respect. The record shows that both Phillips and Jerome had separate counsel. No one appeared for the Western Bankers' Trust Company. As is always the case when there are two sets of lawyers whose interests are in conflict, there was double cross-examination, and questions were repeated which would not be permitted if there was but one attorney and one party in the suit. Sometimes it is quite difficult to determine just what objections should be made, and which counsel should make them. It is also difficult to determine what is proper cross-examination for each party, and whether each party should be limited to the cross-examination made on the other side. Considerable friction occurred in this case between the counsel representing the respective parties. We have examined the record and are of the opinion that there was no reversible error in the respect complained of and that no injury was done to the plaintiff in error by reason thereof.

The principal ground of reversal urged is that the evidence does not sustain the verdict as to the defendant in error Phillips, and for that reason the court should have granted the motion for a new trial. The evidence shows that in 1914, the Western Bankers' Trust Company was organized as a corporation in the State of Delaware. It was authorized to sell \$500,000.00 common stock and \$500,000.00 preferred stock. Its principal business was to deal in real estate and deferred installment contracts, and to discount commercial paper. At one time it had an office on the banking floor of the Railroad Exchange Building in Chicago. The common stock was issued to the secretary, a man by the name of Neurick. He endorsed it in blank and delivered it to Morris M. Robinson, the president of the corporation. Robinson, as president, with certain directors, made a contract with Morris M. Robinson and Company to underwrite the entire capital stock and to sell it on a





commission of twenty-five per cent. Robinson entered into an agreement with the defendant in error, L. Edgar Jerome, to sell the stock on a commission of ten percent. In April, 1916, Jerome went to the village of Henry, in Marshall county, Illinois, to sell stock to the people of that vicinity. At that time the defendant in error, Lewis R. Phillips, was the cashier of the Henry County National Bank. It is contended by the plaintiff in error that Jerome made his headquarters at the Henry County National Bank, used its directors' room as his office; that Phillips and his son introduced and recommended Jerome to various prospective customers; that the notes given in payment for the stock were discounted by Phillips; that the remittances of cash were through the bank on drafts signed by Phillips; that Phillips received a part of this money for this services; and that Phillips and Jerome conspired together to falsely represent the stock so that it could be sold, and as a result \$65,000.00 worth of the stock was sold to people residing in Marshall county, and that Sampson Rowe purchased \$17,500.00 of stock.

The evidence shows that shortly after Jerome arrived in Henry, he purchased a second hand automobile from Phillips and gave him his note for \$250.00 in payment for the same, and also agreed to give Phillips ninety shares of stock as the same was issued to Jerome for commission. The evidence shows that when Jerome went to Henry, he was not acquainted with Phillips. He went to the bank and opened a checking account, and some of the notes given by various parties in payment for stock, were purchased by the bank, or by Phillips, or his wife. It also appears from the evidence that many drafts were purchased at the bank by Jerome, but there is no evidence that Phillips received a part of the money derived from the sale of the stock. In each instance the draft was less than the amount of the sale, but this is explained on the theory that Jerome deducted his commission before remitting the balance. It is denied by both Phillips and Jerome that Jerome made the bank his headquarters, or used the directors' room as his office, and it is



contended by both of them that Jerome merely was a customer of the bank and used it as an instrumentality for the transfer of money received by him in the sale of the stock.

It is contended by both Phillips and Jerome that neither Phillips nor his son took Jerome over the country introducing him to prospective customers, or recommended the stock as a desirable investment. It is earnestly insisted by the plaintiff in error that on June 24 or 25, 1914, Phillips took Jerome to the home of Sampson Rowe and urged Rowe to purchase some of the stock. The evidence on that point shows, as far as Phillips and Jerome are concerned, that on that occasion Phillips was getting into his automobile in front of the bank. Jerome came along and Phillips told him he was going out into the country, and Jerome said he would ride with him as far as Sampson Rowe's house. When they arrived at Sampson Rowe's house, Jerome got out and went into the house. Phillips drove on past the house, but after he had gone a short distance he discovered that some of Jerome's selling kit had been left in the car. He turned around and went back to the house and took the selling kit into the house to Jerome. It was on this occasion that plaintiff in error insists that statements were made by Phillips relative to the sale of this stock. On behalf of plaintiff in error the evidence shows that there were present on that occasion Phillips, Jerome, Sampson Rowe and wife, Frank Rowe, a son of Sampson Rowe, and Mervin Rowe, a grandson. At the time of the trial Mrs. Rowe was dead and Sampson Rowe was in such a mental condition that his evidence was of very little value. Frank Rowe testified that Phillips said he had every reason in the world to believe this corporation was all right. That he had invested, and knew there were good men at the head of it. He said it was drawing seven per cent interest which was more than they were getting out of the bank at Henry. Mervin Rowe, who was a boy only thirteen years of age, testified that when Phillips and Jerome drove up to the house he was suspicious that they were going to sell his grandfather some stock; that he left his play and went into the house to hear what







was said. He had never seen Jerome before. He testified that Phillips introduced Jerome to his grandfather and grandmother, saying that Jerome was a fellow from Chicago, a sort of director or officer of this bank, and wanted them to put some money in the bank, to buy stock, that it was good investment; that Phillips said he had invested some of his money in it, and he was a director, and he said they were paying seven per cent interest, or dividends, or what you call it. He testified that Phillips said it was a good thing and he did not see why they did not put their money in it; that there were a few in town who had put their money in it and bought stock and he named several; that he said Jerome was straight, good, reliable on anything he said. It is difficult to understand just why this thirteen year old boy's suspicions were aroused when he had never seen Jerome before, and did not know what his business was. This testimony of both Frank and Mervin Rowe is disputed by both Jerome and Phillips. Phillips testified that he was only in the house a few minutes, that during the conversation he never said anything with reference to this corporation, or made any recommendation and in this he is corroborated by Jerome, who also testified that Frank Rowe was present on this occasion but that Mervin Rowe was not present. It also appears from the evidence that prior to this time, Sampson Rowe had been introduced to Jerome in a saloon by William Rowe, a brother of Sampson Rowe.

Evidence was also introduced by plaintiff in error tending to show that Phillips took Jerome to the home of a man by the name of Wheeler for the purpose of inducing Wheeler to buy this stock. This evidence, however, is very unsatisfactory for the reason that Wheeler was not at home when Jerome and Phillips are alleged to have come to his house for this purpose. All that he knows about it is what he was told by his wife, who knew Phillips, but she was not sure whether the man with him was Jerome. Both Jerome and Phillips deny they were ever at Wheeler's house together. This is about all of the evidence there is tending to show any representation by Phillips

was said. At that moment the witness said:

"I am not sure that I am not mistaken, but I am sure that I am not mistaken."

of this fact, and stated that he was sure that it was true, and that it was true."

interested him in his work in the past, and he was a student, and he was a student."

they were saying, and he was saying, and he was saying, and he was saying."

he did not say that he was not sure that it was true, and that it was true."

and he heard, however, that he said, "I am not sure that it was true, and that it was true."

why this thing is not true, and why it is not true, and why it is not true."

last year, when I was in the hospital, and I was in the hospital, and I was in the hospital."

this thing is not true, and why it is not true, and why it is not true."

James a few minutes, and during the time, and during the time, and during the time."

nothing was said, and during the time, and during the time, and during the time."

and in this he was not sure that it was true, and that it was true."

from him was not sure that it was true, and that it was true."

not present. It was during the time, and during the time, and during the time."

time, and during the time, and during the time, and during the time."

William says, a witness of the time, and during the time, and during the time."

William says, a witness of the time, and during the time, and during the time."

with reference to this stock, or anything done by him in the way of introducing Jerome to prospective customers.

There is evidence, however, tending to show various acts of Jerome, various visits which he made to the house of Rowe, and many things which he did with reference to the sale of this stock, but as Phillips was not present and took no part in any of these transactions, he cannot be held liable therefore unless a conspiracy between them is established by the evidence.

The evidence shows that Rowe was a man between seventy-five and eighty years of age and worth between three hundred and four hundred thousand dollars. He did not do a general banking business with the Henry County National Bank, but had some certificates of deposit in that bank. On July 15, 1914, Jerome sold to Rowe fifty shares of stock for \$5,000.00, which was paid for by a certificate of deposit on the First National Bank of Henry, which certificate was cashed by Jerome at the Henry County National Bank. On August 9, 1914, Jerome sold \$6,000.00 worth of stock to Rowe and took his note for that amount. This note was taken to the Henry County National Bank and Jerome wanted to sell it to Phillips. Phillips did not buy the note until Rowe came to the bank and stated that he had given it for stock, that it was all right and would be paid, whereupon it was purchased by the bank. Jerome afterwards obtained other notes from Rowe and took them to the bank. These notes were three in number, two for \$2,000.00 each, and one for \$1,500.00. These notes were purchased and paid for by money which Phillips claimed belonged to his wife. Some of these notes fell due after this suit was commenced, some of them were renewed after that time, and all of them were paid. After the suit was commenced Rowe went to the bank to pay a note on March 8, 1917. At that time, in the presence of several witnesses, he stated that he brought suit against Phillips because he was told that he could get his money back. Phillips asked Rowe if he, Phillips, had ever solicited him





to buy stock in the corporation, or if he had ever done anything to induce or encourage him to buy stock, or if he had ever talked to him about the company, or if he had ever told him he had any money in the corporation, or had told him it was a good concern and was paying a large dividend. Rowe replied that Phillips had not told him any of these things. These facts were testified to on the trial by several witnesses who were apparently reputable.

The evidence also shows that at one time, during these negotiations, a pamphlet, or circular, was sent out by the corporation in which it was stated that Phillips was on the advisory board. Phillips testified that this circular was sent out without his knowledge or consent, and as soon as he knew it was sent out he went to the Chicago office of the corporation and demanded that his name be removed from the circular, and it was removed.

The above are the principal facts in evidence, tending to prove the allegations in the declaration of a conspiracy between the corporation, Jerome and Phillips, to defraud the plaintiff in error. The only other evidence is that relative to the various amounts of money which were remitted by Jerome to the corporation at its Chicago office. The books and records of the bank, covering all these transactions, were admitted in evidence, and there was an attempt made to establish by these books and records a conspiracy between these parties to defraud the plaintiff in error. Conspiracy and fraud are never to be presumed, but the burden of proof is upon the parties who allege such fraud and conspiracy. Carter vs. Carter, 283 Ill.324. The evidence, taken as a whole, in its most favorable light with reference to the transactions with the bank, simply shows that Phillips, as an officer of this bank, dealt with Jerome as he did with most any other customer of the bank who might desire to sell commercial paper, and to open a personall account, and transmit large sums of

The evidence also shows that at one time, during these

[illegible][illegible]

money to the home office. Phillips would not be liable for these transactions, even though he might have suspected that the stock was worthless, unless he took some part in the sale of the stock, thus defrauding the purchasers of the stock. The only instance in which the evidence shows that Phillips made representations with reference to the stock, or even introduced Jerome, are flatly contradicted by other evidence, some of which, at least, is just as credible as that offered on behalf of the plaintiff in error. Even if the evidence of Frank Rowe and Mervin Rowe be considered as true, it was not sufficient to establish the charge in the declaration. In order to charge a party with fraud and conspiracy, the burden of proof is not only upon the person who alleges such fraud and conspiracy, but the evidence must be of a clear and convincing character. It may be true that the stock of this corporation was worthless, and that a fraud was committed on every person who purchased the stock, and that both Jerome and the corporation are guilty, but the question as to whether or not Phillips was a party to that fraud and conspiracy, was a question of fact for the jury to determine. The jury heard all of the evidence and decided that Phillips was not a party to the fraud. Before we would be justified in reversing this judgment as to Phillips, it would be necessary for us to hold that the finding of the jury was clearly against the weight of the evidence. We are not prepared to say that the verdict of the jury is against the weight of the evidence, but on the contrary, we think the evidence wholly failed to establish the charge of fraud and conspiracy against Phillips in such a clear and conclusive manner necessary to justify a verdict against him.

There are almost one hundred specific objections to the rulings on the admission and exclusion of evidence; about twenty instructions, either given or refused, are specifically objected to, and each of these one hundred and twenty points are argued at considerable length in the briefs. It will be impossible, within





the reasonable limits of an opinion, to consider each one of these alleged errors in detail. It is apparent from the briefs and arguments that there was considerable feeling between the counsel representing the various sides. Charges and counter charges are repeatedly made of bad faith and improper conduct by counsel. The record contains almost eight hundred pages. It is not unreasonable that in a record of this size there was evidence excluded which should have been admitted, or that certain evidence was admitted which should have been excluded. The only material question is whether injury was caused by these rulings. Many of these objections to evidence were on the ground that the questions called for conclusions, and that the question asked would not produce the best evidence. Many checks, drafts and various books of the bank were offered in evidence. Numerous questions were asked Phillips concerning these checks, drafts and books, what they represented, and what he did in connection with them. The examination along these lines took a wide range, in fact it went far beyond the legitimate boundaries of the questions at issue. This called forth repeated objections from counsel for the defendants in error, many of which were sustained by the court. The court might properly have sustained many objections which were overruled. After numerous of these objections had been sustained, the objections were withdrawn and the questions were answered. Error is assigned on several questions to which objections were sustained, which questions were later answered without objection. From our examination of the record we do not think any of the rulings complained of were of such a vital nature as to justify a reversal, but on the contrary the plaintiff in error had the benefit of all evidence justified by the questions at issue in the case.

Plaintiff in error's first refused instruction was almost identical with defendants in error's seventh given instruction. There was no error in the refusal of the court to repeat the

the reasonable limits of an opinion, to consider each one of those alleged errors in detail. It is apparent from the brief and arguments that the two were considerably falling before the opponent representing the various sides. On the one hand, the charges are repeatedly made of bad faith and improper conduct by counsel. The record contains almost eight hundred pages. It is not unusual that in a record of this size there was evidence excluded which should have been admitted, or that certain evidence was admitted which should have been excluded. The only material presented in which there was any error was caused by these rulings. Many of these objections to rulings were on the ground that the questions called for some evidence, and that the question asked would not produce the best evidence. Many checks, errors and various kinds of the same were stated in evidence. Numerous questions were asked which were answered these checks, errors and omissions, and they were answered and that he did in connection with them. The examination was then done back a wide range, in fact it was far beyond the legitimate boundaries of what is known as law. This called forth repeated objections from counsel for the defendant in error, many of which were sustained by the court. The court might properly have sustained many objections which were overruled. Their number of these objections had been sustained, the objections were withdrawn and the questions were answered. There is included in several questions to which objections were sustained, other questions were later answered without objection. From one objection of the record we do not take any of the rulings mentioned or more of them. A final ruling as to finding a verdict, but on the matter the district in error and the benefit of all evidence admitted by the questions of fact in the case.

Plaintiff in error's direct examination was almost identical with defendant in error's second direct examination. There was no error in the conduct of the court in respect to

instruction. The second refused instruction was an abstract proposition of law and no error was committed in refusing it. The third refused instruction contained the word immaterial instead of material, and was properly refused for that reason if for no other. The fourth refused instruction did not properly state the law and was covered by the first given instruction on behalf of defendants in error. The fifth refused instruction was properly refused because it covered methods of impeachment which were not material to the case. The sixth refused instruction is long, highly technical and is uncertain in the meaning of the language employed. It was calculated to mislead the jury rather than help them, and for these reasons was properly refused. The seventh refused instruction was as to the measure of damages, but as the jury assessed no damages against Phillips, the only party against whom a reversal is sought, there could be no error in refusing it. The eight refused instruction stated certain facts set up in a plea by Jerome and told the jury that there was no evidence supporting this plea, therefore the jury should find against all three defendants under this plea. As both Phillips and the corporation did not join in this plea, the fallacy of this instruction is apparent. Specific objection is made to nine instructions given on behalf of defendants in error. It will be impossible for us to consider each of these objections in detail. We deem it sufficient to say that from our examination of all of the instructions both given and refused, we find no error in the ruling on any of them. We think the jury was fully and accurately instructed as to every question at issue, and that the judgment should not be reversed on account of errors in rulings on instructions.

We find no reversible error and the Judgment is affirmed.

Judgment affirmed.







STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
Apr. in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.



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7730  
(0015)  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





Laura Tillberg,

Appellee,

vs.

Appeal from the Circuit

Rockford City Traction Company,  
a corporation.

Court of Winnebago County.

Appellant.

Partlow, J.

Appellee, Laura Tillberg, recovered a judgment for \$1000.00 in the circuit court of Winnebago county, against appellant, Rockford City Traction Company, for personal injuries sustained by her, and from that judgment this appeal was prosecuted.

The accident occurred about eight o'clock on the morning of January 18, 1920. The appellee was employed as manager of Buckbee's Floral Shop in the city of Rockford. She entered a street car of the appellant at the corner of North Church and Napoleon Streets to go down town to her work. All of the seats were occupied and passengers were standing in the aisles. She entered the rear door and stood in the aisle just inside the door. At about Fisher Avenue, flames suddenly shot out from the controller in the front end of the car. The passengers became panic stricken and rushed to the rear door to escape. The appellee was knocked down onto the floor, was trampled upon, and crowded under one of the seats. The motorman threw off the automatic circuit breaker which is commonly called the overhead. The flames subsided very quickly, but the car was filled with smoke, which is alleged to have come from the burning of the rubber insulation. The passengers were taken down town and the appellee was removed to her home about eight thirty that morning. She testified that she remained at home for about three weeks, during which time she was confined to her bed, her limb was bandaged, and she suffered pain and could not sleep. A regularly licensed physician made one call to see her. Dr. Medaris, an osteopath physician, treated her regularly during the time she was confined to her home. After she began work, she continued to

Case No. 11111

Appellee

vs.

Appellant

Court of Appeals

Appellant

Appellee

Appellee

Appellee, Lawrence T. Hildebrand, recovered a judgment for

\$2000.00 in the circuit court of Winnebago county, against  
 appellant, Rockford City Traction Company. For personal injuries  
 sustained by her, and from that judgment this appeal was prosecuted.  
 The accident occurred about eight o'clock on the morning

of January 18, 1920. The appellee was employed as a messenger  
 in the Rockford City Traction Company. She was seated  
 in the rear of the car at the corner of North Lincoln and  
 Madison Streets to go down town to her work. All of the seats  
 were occupied and passengers were standing in the aisles. She

opened the rear door and stood in the aisle just inside the door.  
 At about Fifth Avenue, Traction suddenly went out from the station

to the front end of the car. The passengers became panic stricken  
 and rushed to the rear door to escape. The appellee was knocked  
 into the floor, and crushed under, and crowded under one of  
 the seats. The motorist threw off the automatic circuit breaker  
 which is commonly called the emergency. The Traction Company very  
 quickly, but the car was filled with smoke, which is caused by

the smoke from the burning of the rubber insulation. The passengers  
 were taken down town and the appellee was released to her home about  
 eight thirty that morning. She testified that the number of her

car was three weeks, during which time she was confined to her  
 bed, her head was lacerated, and she suffered with a very bad  
 laceration of the right eye, and she was taken to the hospital  
 at Rockford Hospital, located her regularly during the time she  
 was confined to her home. After the injury with, she continued to

take treatments from him twice a week until May, 1920, and twice a month until December, 1921. Her physician testified that there was a discoloration on her left arm and leg, the discoloration showing around the elbow, the knee, the hip and pelvis. On the limb there was a general discoloration of eight to ten inches which was of a dark bluish color. He gave it as his opinion that there was more or less shortening of her left limb, and that the injury on the lower part of the spine caused a contraction of the muscles of the limb. His bill was \$150.00

The declaration consisted of four counts. The charge of negligence in the first count was that the appellant carelessly, negligently and improperly furnished a car upon which to carry the appellee as a passenger, which car was in such bad and improper state of repair that from the controller and front end of the car, while the car was being operated, there emitted certain fire, which was calculated to and did frighten the passengers so they crowded to the rear of the car where the appellee was standing and she was knocked down and injured. The allegations of the second, third and fourth counts are substantially alike, and are that the appellant by its servants, so negligently, carelessly and improperly ran, drove, managed, operated and controlled said car, that by and on account thereof, while said car was in operation, there emitted from the controller and front end of the car certain fire, which was liable to, and did frighten the persons in said car, etc.

On the trial, appellee proved the injury and the circumstances under which it occurred, but she offered no proof as to the charge of negligence contained in any count of the declaration. In defense, the appellant offered expert testimony to explain and overcome the presumption of negligence which arose by operation of law from the facts presented. Appellee offered no evidence to rebut the testimony of these experts who attempted to explain the cause of the accident. Appellant now insists that there is no conflict in the evidence relative to the existence or nonexistence of the cause



late testimony from him twice a week until May, 1937, and twice a month until December, 1937. Her deposition testified that there was a dislocation on her left arm and leg, the dislocation involving around the elbow, the knee, the hip and pelvis. On the left there was a general dislocation of right to her fingers which was of a dark bluish color. He gave it as his opinion that there was more or less shortening of her left limb, and that the injury to the lower part of the spine caused a constriction of the muscles of the limb. His bill was \$150.00.

The dislocation consisted of two causes. The charge of negligence in the first cause was that the appellant negligently, recklessly and wantonly furnished a car which was unfit for use as a passenger, which car was in such bad and dangerous state of repair that from the controller and front end of the car, while the car was being operated, there existed certain flaws, which were calculated to and did heighten the consciousness of the driver of the rear of the car where the appellant was sitting and the way it would turn and injure. The allegations of the record, that the car was in such a substantially worse, and that the appellant by its conduct, so negligently, recklessly and wantonly used, drove, managed, operated and controlled said car, that it did so recklessly, wantonly and in such a manner, that it caused injury to the driver, while said car was in operation, there existed from the controller and front end of the car certain flaws, which did heighten, and did heighten the consciousness of said car, etc.

On the trial, appellee moved the injury and the damages to be awarded under which is submitted, but the offer was not in the charge of negligence contained in any count of the declaration. In defense, the appellant offered expert testimony to explain and overcome the presumption of negligence which arose in connection with the facts presented. Appellee offered no evidence to rebut the testimony of these experts who attempted to explain the cause of the accident. Appellant now insists that there is no accident in the evidence relative to the car, so as to constitute an accident.



of the accident; that the evidence of the experts overcome the presumption of negligence, and for these reasons the verdict should have been in favor of the appellant, and for that reason the judgment must be reversed.

The evidence shows that the car was of a large type, had double trucks, with a vestibule in each end. There were steps at each end which folded up. The car had stopped shortly before the accident, and had just started and was moving slowly at the time of the accident. Just prior thereto, the overhead blew out, and the motorman knocked it back into place. When it blew out there was a flash. The motorman was a man of several years' experience, and testified that the car was working properly that morning. The blaze shot out from the top of the controller box which was in the front end of the car. This controller box was about thirty-six inches high, eighteen inches wide and eight inches thick. It had a cast iron back, brass top, and the sides and front were sheet iron. On the inside was a main cylinder and a reverse cylinder. The box was lined with asbestos. On top of the box were levers used for reversing the car, and for turning the current on and off. The current was turned on by means of a lever attached to a shaft, and to this was attached what are known as fingers mounted on a wood block, with segments on the reverse cylinder likewise mounted. The fingers are operated by wires directly from the circuit-breaker to the top or trolley finger in the controller. As soon as the fire shot out of the top of the controller box, the motorman threw off the overhead and went to the rear of the car and pulled the trolley from the wire. When he threw the circuit breaker, he disconnected the current from the controller box, and the pulling of the trolley pole had no effect.

Willis R. Hill was an expert witness for appellant. He testified that he was familiar with the construction of the overhead circuit-breaker, and the electrical equipment, together with the K-10 controller; that this type of controller was in general use, and that

At the accident; that the evidence of the accident occurred on the  
occurrence of negligence, and the issue remains the verdict should  
have been in favor of the appellant, and it is that reason the  
verdict must be reversed.

The evidence shows that the car was of a large type, had  
a wide track, with a vestibule in each end. There were steps at  
each end which folded up. The car had stopped shortly before the  
accident, and had just started and was moving slowly at the time of  
the accident. Just prior thereto, the track had been up, and the  
motorman had let it back into place. When it did not move was a  
little. The motorman was a man of several years' experience, and  
testified that the car was working properly that morning. The driver  
went out from the top of the controller box which was in the front  
part of the car. This controller box was about thirty-inches  
high, slightly tapered at the top and at the bottom. It had a door  
from back, front top, and the sides and front were closed in. On  
the inside was a main cylinder and a reverse cylinder. The door  
was lined with rubber. On top of the box were several small  
reversing the car, and for turning the current on and off. The  
current was turned on by means of a lever attached to a shaft, and  
in this was attached what was known as finger mounted on a wheel.  
There were segments on the reverse cylinder likewise mounted.  
The finger was connected by wires leading from the electric  
to the reversing finger in the controller. As the finger  
went out of the box at the controller box, the motorman, when at  
the overhead and went to the rear of the car and pulled the lever  
from the wheel. When he threw the current forward, he disconnected  
the current from the controller box, and the action of the finger  
pole had no effect.

William A. Hill was an expert witness for appellant. He  
testified that he was familiar with the construction of the  
electricity, and the electrical equipment, testified that the  
controller; that this type of controller was in common use, and that

all were of the same construction; that a blow-out is usually caused by metallic gas which forms in the controller, that a copper vapor forms in the space between the case and fingers where the circuit is broken, there is an arc which forms this gas and causes a short circuit which caused an explosion or burning in the controller. He testified that there was no way to prevent this and operate the car, that there was no way by which it could be detected by inspection, and there was no way a warning could be given of an explosion; that there was considerable heat developed in the arc, and sometimes this heat was great enough to melt the covering, burn a hole through the sheet covering and melt the asbestos; that there was no way to construct the controller to prevent these fumes from forming, and no way to determine in advance when an explosion would take place. He testified that the cause of this explosion was an arc in the controller, and that an arc is a breaking of the current.

H. A. Barbero, an expert, called on behalf of appellant, testified that there must be an arc before there can be an explosion. That an arc may be formed in the controller by the following causes: By throwing the controller to an off position too quickly, which may be done by the motorman with the handle, by a grounded field, by a grounded cable anywhere on the car, by an improper connection of an armature, by a brush in the field which is off of the neutral point; that where there is a rheostat field the electricity may jump across and cause an arc in the controller; that where a segment is off or not properly adjusted, the fingers in the controller might cut off the current; that a broken rheostat, under certain conditions, might set up an arc; that a grounded armature might cause an arc in the controller; that an open circuit in the armature would sometimes cause a flash to the brush holder and it might jump across to the ground.

While negligence is never to be presumed, yet the circumstances surrounding a case where the doctrine of *res ipse loquitur* applies may constitute evidence from which negligence may be found.





Where the facts are within the maxim of *res ipsa loquitur*, proof of the circumstances surrounding such a case and of the injury, constitute a *prima facie* case of negligence, and will justify a verdict, unless such *prima facie* case is overcome by proof showing the party charged is not at fault. *Barnes vs. Danville Street Railway and Light Company*, 235 Ill. 566. Where an injury occurs to a person, who is a passenger in the exercise of ordinary care upon the car of a common carrier, by some defect in the machinery wholly under the control of the carrier, a *prima facie* case of negligence on the part of the carrier is established, and the burden of proof is upon the carrier to show that the accident was without fault. *North Chicago Street Railway Co. vs. Colton*, 140 Ill. 486; *Union Traction Co. vs. Newmiller*, 215 Ill. 383; *Chicago City Railway Co. vs. Barker*, 209 Ill. 321; *Chicago Union Traction Co. vs. Giese*, 229 Ill. 260; *Feldman vs. Chicago Railways Co.*, 289 Ill. 25. The burden rests upon the defendant to overcome the presumption of negligence arising from the circumstances of the particular case. *Feldman vs. Chicago Railways Co.*, 289 Ill. 25; *Kanter vs. St. Louis, Springfield and Peoria Railroad Co.*, 218 Ill. App. 565; *Klaustermeier vs. St. Louis, Springfield and Peoria Railroad Co.*, 222 Ill. App. 374.

In support of its contention that the testimony of the appellant overcome the legal presumption of negligence and should be controlling in this case, appellant cited the case of *Garner vs. Chicago Consolidated Traction Company*, 150 Ill. App. 149, which is a case quite similar to this case. The judgment in that case was reversed because of an error in a ruling on evidence, but the evidence showed that flames from the controller could only have occurred in certain ways which were beyond the control of the defendant and its servants. For that reason, it was held that the legal presumption that the defendant was guilty of negligence was overcome by the evidence and that the judgment could not be sustained. That, however, is not the condition of the record in this case. The facts presented on behalf of the appellee were sufficient to make



a prima facie case in her favor. She offered no evidence tending to prove the negligence charged in the declaration, but the presumption of law was in her favor on that point. At the close of the evidence on behalf of the appellee, the appellant offered the testimony of these expert witnesses who attempted to prove such a state of facts as showed that the accident was caused through no fault of the appellant or its agents. If the evidence of these experts did show that the accident was caused through no fault of the appellant, then this judgment could not be sustained, but we do not think the evidence offered on behalf of appellant was sufficient to overcome the prima facie case made by the appellee. The testimony of these experts shows that this accident was caused by an arc in the controller. This arc might have been caused by many different things as testified to by these witnesses, several of which were within the power of appellant to control. Under this evidence it might have been caused by the negligent operation of the car by the motorman, or it might have been caused by defective parts of the machinery. If the evidence on behalf of the appellant did not overcome the prima facie case made by the appellee, or there was a conflict in the evidence as to the cause of this injury, it then was a question of fact for the jury to determine what was the cause of the injury. We think that is the condition of this record. It was a question of fact for the jury to say what was the cause of the injury, and under the conflicting evidence, we cannot say the verdict is not in accordance with the evidence.

The sixth instruction told the jury that if they believed from the preponderance of the evidence that the plaintiff was a passenger on one of defendant's cars, and suddenly there was an explosion, and fire burst from the controller while the car was being operated, that there was raised from the fact of the fire breaking out of the controller, a presumption that the defendant, or its agents, were negligent, and that the burden of proof was upon the defendant to furnish evidence sufficient to rebut the

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inference that the defendant or its servants failed to use due care at the time of said occurrence. Appellant's objection to this instruction is that it assumes that there was no evidence rebutting the presumption of negligence; that the sufficiency of the evidence to rebut was a question of law for the court and not one of fact for the jury; that the presumption arises from the nature of the accident and not from the mere fact of the accident having happened. We have examined the authorities cited for and against this instruction, and we find that they are not entirely in harmony relative to the presumption arising from the fact that an accident took place. There are some expressions in some of the cases which would justify this instruction, while in others the language of the instruction does not come within the rules of law announced. The authorities sustaining the language used in this instruction are North Chicago Street Railway Company vs. Cotton, 140 Ill. 486; Chicago Union Traction Co. vs. Giese, 229 Ill. 260; Feldman vs. Chicago Railways Company, 289 Ill. 25. The cases to which our attention has been called which do not justify this instruction are Vischer vs. Railway Company, 236 Ill. 572; Barnes vs. Danville Street Railway and Light Company, 235 Ill. 566. We do not think this instruction was of so much importance as to work a reversal, even though it be conceded that it is not exactly accurate. There were other instructions given covering the doctrine of res ipsa loquitur which were sufficient to fully inform the jury as to the rules of law applicable to this doctrine, and we do not think the jury was misled by the instruction as given.

Complaint is made of the seventh instruction which is predicated upon the evidence tending to show that the defendant through its servants negligently, carelessly and improperly drove, ran, managed and operated a car so that it emitted fire from the controller and front end. The instruction is based upon the doctrine of negligence. It contains all of the elements necessary for a recovery, and therefore properly directed a verdict. We do not think it is

...the fact that the Commission on the ...  
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...information is that it is ...  
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subject to the criticism of the appellant that it ignores the appellant's defense, or that when taken in connection with the sixth instruction it was erroneous. The eighth instruction among other things told the jury that if they believe the fire was calculated to and did frighten the other persons in the car, they should find appellant guilty. The criticism is because of the use of the word "calculated". The instruction recites all of the facts necessary to entitle appellee to recover. The word calculated has a well known meaning and as used in this instruction was not erroneous and had no tendency to mislead the jury. The ninth instruction is criticised, but it is sustained by the case of Union Traction Co. vs. Newmiller, 215 Ill. 383.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.





STATE OF ILLINOIS, }  
SECOND DISTRICT. { ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
April in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.



7144 (C 19/89)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





Peter Grabow, Administrator of the  
Estate of George Grabow, deceased,

Appellee,

vs.

Appeal from the Circuit  
Court of Will County.

Chicago and Alton Railroad Company,

Appellant.

Partlow, J.

Appellee, Peter Grabow, as administrator of the estate of George Grabow, deceased, began suit in the circuit court of Will county against appellant, the Chicago and Alton Railroad Company, to recover damages for the death of George Grabow. There was a trial by jury, verdict for the appellee for \$2500.00, and an appeal has been prosecuted to review the judgment rendered upon the verdict.

The accident occurred on January 10, 1921, about 4:40 o'clock in the afternoon at the crossing of appellant's track with the main highway in the village of Romeo, which is about eight miles north of Joliet, in Will county. The railroad runs north and south and the highway extends east and west. On the north side of the highway just east of the railroad was Tony Kotchen's soft drink parlor. Directly opposite on the south side of the highway was Mitchell's store, which was about thirty-eight feet wide. East of Mitchell's store there was a yard or driveway, and east of the yard was a carriage shed. Just west of Mitchell's store there were two tracks of the Chicago and Joliet Electric Railway Company. From the west line of Mitchell's store to the east line of the interurban track was 12.8 feet. The grade from the carriage shed to the interurban track was about ten per cent, or eight feet. Appellant's tracks were west of the interurban track. From the east rail of

John O'Grady, Administrator of the  
State of Georgia, deceased,  
Appellee,

Appellant, vs. the State of Georgia,  
County of Wilcox.

vs.  
Chicago and North Western Railway,  
Appellant.

Case No. 1.

Appellee, John O'Grady, as Administrator of the estate

of George O'Grady, deceased, began suit in the circuit court of

Wilcox county against appellant, the Chicago and North Western

Railway, to recover damages for the death of George O'Grady. There

was a trial by jury, verdict for the appellee for \$2500.00, and an

appeal has been presented to review the judgment rendered here.

The facts are:

The accident occurred on January 15, 1911, about 4:45

A.M. in the afternoon at the crossing of appellant's track with

the main highway in the village of Americus, which is about eight miles

south of Joliet, in Wilcox county. The railroad runs north and south

and the highway extends east and west. On the north side of the

highway just east of the railroad was Tony Johnson's well known

barber. Directly opposite on the south side of the highway was

Michael's store, which was about thirty-eight feet west of

Michael's store there was a yard or driveway, and east of the yard

was a building line. Just west of Michael's store there were two

tracks of the Chicago and North Western Railway Company. From

the west line of Michael's store to the east line of the intersection

track was 112.5 feet. The grade from the carriage track to the

intersection track was about ten feet, or eight feet. Michael's

store was west of the intersection track. From the east rail of

the interurban track to the east rail of appellant's track was 58.3 feet. Appellant had two tracks, a north bound or east track and a south bound or west track. There was a small grade from the west line of Mitchell's store to the appellant's track. On the south side of the highway between the interurban tracks and the appellant's tracks there was a platform twelve by sixteen feet, which was used for loading milk. This platform was about four and one-half feet above the ground and the east and south sides were boarded up and there was a roof over it. There was a line of telephone poles along the interurban right of way just east of the appellant's east line, which poles were about seventy-five feet apart. From appellant's east right of way line to the east line of the milk platform was sixteen and one-half feet, and in this space there were some obstructions and debris which obstructed the view to the south to a certain extent. There were no gates at the crossing and no flagman. On the north side of the highway east of appellant's track there was a sign with the word "Stop" on it, and a similar sign was on the south side of the highway west of the tracks. On the west side of the tracks there was a post on which there was an electric bell or gong. When trains coming from the south reached a point two thousand feet south of the crossing, the bell started to ring and continued to ring until the last car had passed over the crossing some thirty or forty feet.

There had been a ~~frank~~<sup>beer</sup> sale near Romeo the day of the accident, and a number of men who had attended the sale were in Tony Kotchen's soft drink parlor. Charles Grabow, a brother of the deceased, had been in Chicago during the day and returned on an interurban car and got off at this crossing about 4:30 in the afternoon. He met his brother, the deceased, George Grabow, and they went into Tony Kotchen's place where they remained for a few minutes. They then crossed the street to the driveway east of Mitchell's store where there was a new Chevrolet touring car belonging to the deceased. They got into the car, backed it out into the

The information given to the west side of Appleton's street was 22.5 feet. Appleton had two tracks, a north bound on west track and a south bound on west track. There was a small grade from the west line of Appleton's street to the Appleton's track. On the north side of the highway between the intersection tracks and the Appleton's street there was a distance twelve by sixteen feet, which was used for loading mill. This distance was about four and one-half feet above the ground and the east and south sides were bounded by and there was a rock over it. There was a line of telephone poles along the intersection right of way just east of the Appleton's street line, which poles were about seventy-five feet apart. From Appleton's street right of way line to the west line of the mill platform was fifteen and one-half feet, and in this space there were some obstructions and debris which obstructed the view for the track to the west extent. There were no gates at the crossing and no sign. On the north side of the highway east of Appleton's street there was a sign with the word "STOP" on it, and a similar sign was on the south side of the highway west of the track. On the west side of the track there was a post on which there was an electric bell or gong. When trains coming from the south reached a point two thousand feet north of the crossing, the bell started to ring and continued to ring until the last car had passed over the crossing some thirty or forty feet.

There had been a <sup>small</sup> sale near corner the east of the intersection, and a number of men who had attended the sale were in Tony Katschen's wolf skin jacket. Tony's brother, a brother of the deceased, had been in Chicago during the day and returned on the afternoon car and got off at this crossing about 4:15 in the afternoon. He had his brother, the deceased, Tony's brother, and they went into Tony Katschen's place where they remained for a few minutes. They then crossed the street at the highway cross at Appleton's street where there was a new telephone booth and they got into the car, backed it out into the



highway and started west. George Grabow was driving and there is some dispute as to whether or not all of the side curtains were on the car. George Grabow sat in the front seat on the left hand side. The automobile proceeded west across the interurban tracks and onto the railroad track. It was struck by a north bound passenger train running about forty to sixty miles per hour. The automobile was demolished. George Grabow was killed, and Charles Grabow was injured, rendered unconscious, and removed to a hospital.

The declaration consisted of three counts. The first count charged a failure to ring a bell and sound a whistle as provided by the statute. The second count charged that the electric crossing bell was not in good condition and repair and did not ring upon the approach of the train. The third count charged the operation of the train at a high and dangerous rate of speed.

As ground for reversal appellant contends that the evidence does not show it was guilty of the negligence charged in the declaration; that the evidence shows the engine bell was ringing, the whistle was blown at the whistling post south of the crossing, as provided by law, and the crossing bell was ringing; that the evidence fails to show that the speed of the train was the proximate cause of the injury; that the evidence shows the deceased was guilty of contributory negligence for the reason that his car was entirely enclosed by curtains, he drove down to the track at twenty miles per hour, did not stop as required by the stop signal, but proceeded to cross the track in spite of all the warnings. Error is also assigned on the rulings on evidence and instructions.

As is usually the case in actions of this kind, the evidence upon all of these points is in considerable conflict. When the automobile backed out of the driveway and started west towards the railroad track, it is undisputed that both rear side curtains were on the car. There is a conflict in the evidence as to whether the side curtains were on in front. Some of the witnesses say the left hand curtain was not on, others say the right hand curtain was not

highway and started west. George picked up driving and told him  
some distance as to whether or not all of his lights were on  
on the car. George's car was in the front seat on the left hand  
side. The automobile was moving west toward the intersection  
and onto the railroad track. It was struck by a north bound  
passenger train coming about forty to sixty miles an hour. The  
automobile was demolished. George's car was killed and Charles  
Gibson was killed, retained consciousness, but never got to a hospital.  
The doctor contacted at that point. The first contact  
was a failure to ring a bell and found a difficulty in reaching  
the station. The second contact showed that the electric system  
was not in good condition and possibly it did not have the  
approach of the train. The third contact showed the condition of the  
train at a high and dangerous rate of speed.  
As a general statement, the evidence shows that the  
train was not shown to be guilty of the negligence shown in the  
evidence; that the evidence shows the train was not negligent,  
the whistle was blown at the whistle post south of the intersection,  
as provided by law, and the crossing bell was ringing; that the  
evidence fails to show that the head of the train was the negligent  
cause of the injury; that the evidence shows the defendant's policy  
of contributory negligence was the reason that his car was entirely  
destroyed by collision, he drove down to the track at twenty miles  
an hour, did not stop as required by the law, but proceeded  
to cross the track in spite of all the warnings. Given in this  
evidence on the rights on evidence and testimony.  
It is usually the case in cases of this kind, the evidence  
shows all of these points in an unimpeachable conflict. When the  
automobile reached out at the intersection and started west toward the  
railroad track, it is established that both the crossing bell  
on the car. There is a conflict in the evidence as to whether the  
the crossing was on in front. Some of the witnesses say the  
train certainly was not on, others say the light was on and that

on, and still others say both curtains were on. Two witnesses, who were in Mitchell's store, testified that when the automobile passed the store it was going twenty miles per hour. Several other witnesses could not estimate its speed, while still others testified it was going at a moderate speed. At first Charles Grabow testified the automobile was stopped just before reaching the appellant's tracks, but he afterwards changed this statement and said it slowed down before it reached the tracks. All the other evidence is that it did not stop when it reached the tracks, and the great preponderance of the evidence is that it did not slow down before it reached the tracks but went right across at the same rate of speed.

There is a conflict in the evidence as to whether the bell and whistle on the locomotive were sounded and whether the bell on the crossing was ringing. The engineer and fireman testified the bell and whistle on the locomotive were sounded. The porter on the train testified the whistle was sounded, as did also two passengers on the train. Charles Schraeder, who was standing just west of the crossing near the crossing bell, with his sister Louise, a girl fifteen years old, waiting for the train to pass, testified he heard the whistle at the whistling post south of the crossing, and the crossing bell was ringing as the train came up to the crossing. This witness was probably closer than any other witness who testified on behalf of the appellee. Brown Mitchell, who was in the Mitchell store, and the flagman on the train, testified the crossing bell was ringing. Louise Schraeder testified that just before the train struck the automobile the crossing bell was ringing but she did not hear it prior to that time. She did not hear the whistle or bell on the engine but said they might have been ringing. John P. Williams and Fred Boehme, who were in Tony Kotchen's place with the doors closed, Arthur E. Webber, who was two blocks west of the crossing, and Charles Grabow testified they heard no signals given before the accident. The first three modified their statement on cross-examination by saying they were not paying any particular attention,





and were not sure about signals having been given. The evidence of both Williams and Grabow was further weakened by written statements they had made to the claim agent of the appellant prior to the trial, in which Williams said he did not know whether the bell was ringing or not, and Grabow said when he and the deceased started west to cross the tracks he did not remember anything further until he found himself in the hospital; that he could not say whether or not the engine bell was ringing, or a whistle had been sounded, and he could not testify regarding the speed of the train. Edward Heeg testified that on the morning of the accident, about six O'clock, while he was at the crossing waiting for a street car to go to Joliet, he noticed trains going over the crossing and the crossing bell did not ring until the trains hit the crossing. He testified that on January 8, two days before the accident, the crossing bell did not ring until the train hit the crossing. On cross-examination he stated that as the train went north that morning the bell did not start to ring until the engine hit the crossing, and it stopped ringing as the last coach went over the crossing. Evidence was produced, however, to show that at the coroner's inquest he testified the crossing bell did not ring when the north bound train approached the crossing until after the last coach had crossed, and it continued to ring until the train had passed outside of the circuit about one-half mile. John Tcharski was the signal maintainer in charge of the inspection of this electric bell, and Edward Conklin was his helper. The first witness testified he inspected the crossing bell on Saturday before The accident, and on the day after the accident, and it was in good working condition, and he is corroborated by Conklin, who was present when the inspections were made. After the deceased was struck the train backed up to the crossing and remained for almost an hour, during which time the crossing bell rang continuously. The evidence shows that at the time of the accident the train was running from forty to sixty miles per hour.



For the reason that this judgment will have to be reversed and the cause remanded, we purposely refrain from commenting on the facts in this case, and content ourselves with simply stating the facts for the purpose of showing the condition of the evidence. With the evidence in such sharp conflict, it was of the utmost importance that the jury should have been accurately instructed as to the law applicable to these facts. The sixth instructor given on behalf of the appellee is as follows: "The court instructs the jury that the burden of proof or preponderance of the evidence is not determined alone by the number of witnesses testifying on either side. You are the judges of the credibility of the witnesses and the law is that where a number of witnesses testify directly opposite to each other, the jury are not necessarily bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, or lack thereof, their interest in the result of the suit, if any, their opportunity of knowing the facts and circumstances to which they testify, their apparent intelligence, or lack thereof, as shown by the evidence, and the number of witnesses testifying to any particular fact or state of facts, and from all of the evidence in the case say which witnesses are the more worthy of belief and credit their testimony accordingly." This instruction deals with the burden of proof, the preponderance of the evidence and the credibility of the witnesses. It was the apparent intention of this instruction to tell the jury that the preponderance of the evidence is not determined alone by the number of witnesses, but that is not what it says. It starts out as an instruction on the preponderance of the evidence, but it concludes as an instruction on the credibility of witnesses. In the first sentence it tells the jury that the burden of proof or preponderance of the evidence is not determined alone from the number of witnesses testifying on either side. From the language used the jury might think that the burden of proof and the preponderance of



For the reason that this judgment will have to be reversed  
and the entire re-examined, we purposely refrain from commenting on the  
facts in this case, and content ourselves with simply stating the  
facts for the purpose of showing the condition of the evidence.  
With the evidence in such sharp conflict, it was of the utmost  
importance that the jury should have been carefully instructed as  
to the law applicable to these facts. The sixth instruction given  
was full of the errors in as follows: "The correct instruction the  
jury that the burden of proof on preponderance of the evidence is  
not determined alone by the number of witnesses testifying on either  
side. You are the judges of the credibility of the witnesses and  
the law is that where a number of witnesses testify, identity of facts  
on each side, the jury are not necessarily bound to regard the  
weight of the evidence as evenly balanced. The jury have a right  
to determine from the appearance of the witnesses on the stand,  
their manner of testifying, their apparent candor and honesty, or  
lack thereof, their interest in the result of the case, if any, their  
possibility of knowing the facts and circumstances as to which they  
testify, their apparent intelligence, or lack thereof, as shown by  
the evidence, and the number of witnesses testifying on each side  
that on a case of fact, and from all of the evidence in the case and  
what witnesses are the more worthy of belief and credit their  
testimony accordingly." This instruction does with the burden of  
proof, the preponderance of the evidence and the credibility of the  
witnesses. It is the constant intention of this instruction to  
tell the jury that the preponderance of the evidence is not determined  
alone by the number of witnesses, but that it is not what it says. It  
states not only an instruction on the preponderance of the evidence,  
but it contains an instruction on the credibility of witnesses.  
It is the intention of this instruction to tell the jury that the burden of proof on  
preponderance of the evidence is not determined alone from the number  
of witnesses testifying on either side. From the evidence and the



the evidence mean the same, which is not true. It in effect tells the jury that the burden of proof is not determined alone from the number of witnesses. It then tells the jury that they are the judges of the credibility of the witnesses, and that where a number of witnesses testify directly opposite to each other, the jury are not necessarily bound to regard the weight of the evidence as evenly balanced, but it does not tell the jury how the preponderance is to be determined under such circumstances. The instruction then tells the jury they have a right to determine from the appearance of the witness on the stand, and then enumerates several other things, but at the end of this sentence the instruction fails to tell the jury what they have a right to determine. But after enumerating these several things it concludes "and from all of the evidence in the case say which witnesses are more worthy", etc. It does not tell the jury all of the facts necessary to be considered in determining the preponderance of the evidence, and it is confusing in its recital of the facts necessary to determine the credibility of the witnesses. It is not a complete instruction either on burden of proof, preponderance of evidence, or credibility of the witnesses. While the instruction mentions the number of witnesses as one of the elements to be taken into consideration, it fails to tell the jury in specific terms that the number of witnesses testifying to a particular fact or state of facts should be considered by the jury in determining where the preponderance of the evidence is. In fact from the language used it is impossible to tell whether the reference to the number of witnesses relates to the preponderance of the evidence or the credibility of the witnesses. Many cases have been reversed because the instructions on preponderance of evidence omitted the element of the number of witnesses. Chicago Union Traction Co. vs. Hempe, 228 Ill.346; Lyons vs. Ryerson, 242 Ill. 409. No other instruction was given telling the jury what constituted a preponderance of the evidence, or which directed the



jury how to determine the credibility of witnesses. The evidence was close and it was important that the jury should have been properly instructed both as to the preponderance of the evidence and the credibility of witnesses. If no instruction had been given on either of these questions no error would have been committed, but any instruction which was given should have announced a correct rule of law and not mislead the jury. As the Supreme Court said in *Noone vs. O'lehy*, 297 Ill. 160. "The whole effect of the instruction is to minimize the influence of the number of witnesses and encourage the jury to disregard this element." The sixth instruction was so erroneous, misleading and uncertain as to necessitate a reversal of the judgment.

Appellant contends that because of the failure of the deceased to stop before crossing the tracks in obedience to the stop signal which was on the post just east of the track, that he was guilty of negligence as a matter of law and a recovery is barred because of this fact. In support of this position it cites *Lindhout vs. Director General*, 224 Ill. App. 626. In that case there was a stop signal at a distance of three hundred feet from the crossing, as provided by section 145a and 145b of chapter 121, Cahill's statutes, page 3005. Upon examination it will be found that these sections referred to only apply to grade crossings on public highways over railroads outside of the corporate limits of cities and villages. The crossing in question is within the corporate limits of the village of Romeo, and for that reason these sections of the statute did not apply. These sections provide that signal posts on the highway shall be placed at a distance of three hundred feet on either side of the crossing. The stop signals in question were within three hundred feet of the crossing and did not comply with the statute. Even if the statute was applicable, there is no evidence that these stop signals on this crossing were put there by authority of the public utilities commission, as provided in the statute. If they were not established as provided in the statute, their effect was not the same as in the case cited. If they were put there by any





other authority than the one provided in the statute, the rule laid down in the Lindhout case would not apply. For these reasons the deceased, as a matter of Law, was not guilty of contributory negligence.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

other authority than the one provided in the statute, the law is  
not binding on the courts. The law is not binding on the courts  
because it is not a law, and it is not a law because it is not  
binding on the courts.

It is not a law because it is not binding on the courts.

and the courts are not bound by it.

Respectfully,  
J. Edgar Hoover

STATE OF ILLINOIS, }  
SECOND DISTRICT.

ss. .

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30<sup>th</sup> day of  
Apr in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.





67  
7-62 (384/2)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS A. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

229 1A 357

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BE IT REMEMBERED, that afterwards, to-wit: on  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:

# THE HISTORY OF THE

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E. Bills,

appellee,

vs.

Mrs. Andrew Eggenberger,

appellant,

Appeal from the Circuit Court  
of Livingston County.

Partlow, J.

Appellee, E. Bills, began an action of trespass on the case on promises in the circuit court of Livingston county against the appellant, Mrs. Andrew Eggenberger. There was a trial by jury, verdict for the appellee for \$1391.20, judgment on the verdict, and this appeal was prosecuted.

The evidence shows that the appellant, who lives in Odell, Illinois, on March 19, 1931, entered into a written contract with the appellee and Leslie Bills, his son, both of whom lived in Fairbury, Illinois, by the terms of which contract the appellee agreed to put down for appellant on her farm, an eighteen inch, sewer pipe well for \$3.00 per foot, or to drill a well for \$3.00 per foot for the work thereon. Sewer pipe, or six inch well casing, was to be furnished by the appellee. In case it was necessary to curb the well, appellee was to receive an additional compensation of fifty cents per foot for the actual number of feet curbed. The curbing material was to be furnished by the appellant who was also to furnish board for the appellee and his helpers, free of charge. The sewer tile was to be furnished by the appellee at \$1.37 $\frac{1}{2}$  per foot. Appellant agreed to haul the tile, or if a drill was used, she was to haul the casing and pay \$1.00 per foot for six inch casing. Appellee agreed to provide a well that would furnish ten barrels of water at one pumping, or twenty barrels at two pumpings within twenty four hours, and was to receive no pay if he stopped boring or drilling of his own accord. Payment was to be made as soon as the well complied with the contract. Appellee agreed to keep the well in condition to furnish the amount of water stipulated for two years, free





of cost. Appellant reserved the right to stop the boring or drilling at any time, or at any depth, and in such case appellee was to receive half price or \$1.50 for every foot bored or drilled.

Appellee shortly after the signing of the contract went upon the farm with his boring machine, which was operated by mule power, and bored to a depth of 104 feet, in which was placed an eighteen inch sewer tile. On April 30, 1931, the son, Leslie Bills, moved onto the place with his drilling machine, which was operated by steam, and drilled a six inch hole to a depth of 352 feet from the top of the ground, and a four and one-half inch hole from that point to the bottom of the well, which had a total depth of 580 feet. Appellee claims that the well, when completed, consisted of an eighteen inch tile for 104 feet, six inch casing for 82 feet, four and one half inch casing for 352 feet, and from that point to the bottom of the well there was a four and one-half inch hole which was in solid rock and not cased. At a depth of about 300 feet, the evidence on behalf of the appellee shows that Andrew Eggenberger, who was in charge of the work for his wife, inquired of Leslie Bills as to whether or not he had any water. Bills replied that he had nothing but a seep, which did not furnish over three barrels of water, but that he could save the seep by inserting a four and one-half inch casing. Eggenberger said he wanted to save all the water he could, and if he could get a little water, enough for house use, he would like to save it, and he told Bills to put in the four and one half inch casing which was ordered, and five or six hundred holes as large as a match were drilled in the casing to permit the seep water to get into the well. The pipe was left on the ground where the well was drilled and Eggenberger, according to the testimony of Leslie Bills, was there every other day. The appellee testified that he told Eggenberger he could reduce the pipe and save the seep, that he explained to him about drilling the pipe full of holes, and that the effect would be to let the water in that gathered along the rock. He also testified that before using the four and

[illegible]

one-half inch casing he went to the appellant and she gave him the money to pay for the casing. He told her that if a six inch casing was put in it would shut off the water, and he could use the four and one half inch casing and save water.

Mr. and Mrs. Eggenberger deny both of these conversations. Eggenberger testified that he did not know of the use of the four and one half inch casing until Thursday, June 9, which was the day he ordered the appellee to quit drilling. Mrs. Eggenberger testified that she did not know of the use of the four and one half inch casing until the next Friday when Bills figured the four and one-half inch casing at \$1.04 per foot and submitted to her his figures for settlement. Thomas Nance, who was working for appellee on the well, testified that during the progress of the work, after the four and one half inch casing had been placed in the well, Eggenberger talked to him about the well, said it would be bad if they had to reduce the casing again, and Nance replied that it would be. The drill ran continuously by two shifts and they were only making about ten feet every twenty four hours. Edward Van Meter the tenant on appellant's farm, testified that Eggenberger was standing beside him one day when the four and one half inch drill was pulled out of the well and was hanging in the air, and Eggenberger asked Leslie Bills if they would reduce the well when they got down deeper, and Bills explained the matter to him. Eggenberger claims that he made four visits to the well during the time it was being drilled. Both appellee and his son testified that the drilling of the holes in the pipe in the manner in which it was done was common practice with them and that he had followed this practice for thirty five years. John Donbier, a well-digger from Odell, testified on behalf of appellant as an expert, that he had never heard of drilling holes in the casing as was done in this case.

Appellee continued to drill until Thursday, June 9. On that afternoon Eggenberger claims that he went to the premises and asked appellee how he was progressing. Appellee said that



one-half inch casing on each of the horizontal and vertical  
the money to pay for the casing. He said that it was his  
casing was 1 1/2 inches thick all the way, and he could not  
the floor and one inch casing and some water.

Q. Now, the casing was not of the same thickness.

A. The casing was not of the same thickness. It was of the same  
and one half inch casing until Thursday, June 2, when the  
they had ordered the casing to be installed. The casing was  
installed and it was not of the same thickness as the  
half inch casing until the next day, when it was changed to  
four and one-half inch casing. It was not of the same  
to put the casing for the casing. The casing was not  
for the casing on the wall, installed for the casing  
of the wall, when the four and one-half inch casing was  
placed in the wall. The casing was not of the same  
and it would be put in the wall for the casing.

Q. And when the casing was put in the wall, it was not of the same  
by two halves and they were only making about the same  
twenty four hours. When the casing was put in the wall,  
time, installed for the casing and the casing was not of the same  
even the four and one-half inch casing was not of the same  
and was changed to the four and one-half inch casing. This  
it was not of the same thickness and it was not of the same  
thickness and the casing was not of the same thickness. This  
casing to the wall and it was not of the same thickness.

Q. And the casing was not of the same thickness as the casing  
applied and the casing was not of the same thickness as the casing  
the casing to the casing. It was not of the same thickness  
and the casing was not of the same thickness as the casing  
years. When the casing was installed, it was not of the same  
depth of casing as the casing, and it was not of the same  
thickness as the casing. It was not of the same thickness.

Q. And the casing was not of the same thickness as the casing  
applied casing to the casing. It was not of the same thickness  
and the casing was not of the same thickness as the casing.



he had very little water, only a barrel or two, just enough for drilling. Eggenberger testified that he returned to his home in Odell and talked to his wife, then called appellee on the telephone and asked him how the well was coming on. Appellee said about the same, and Eggenberger, then on behalf of appellant, told appellee to stop drilling, which appellee did. Appellee and his son testified that the next morning, Friday, June 10, they went to the house of appellant and demanded the balance due, having previously received \$470.00. They claimed that the well had enough water to furnish the test provided in the contract. Appellant stated that appellee had used a four and one half inch drill and casing and had bored holes in the casing contrary to the contract, and that she was not obliged to pay him more than one half because she had stopped the drilling. Bills and his son testified they returned to the appellant's home on Saturday morning and stayed there until about four o'clock in the afternoon, Eggenberger did not appear and Mrs. Eggenberger would make no settlement in his absence. They were told to come back Monday, and they testified they went back Monday and Eggenberger demanded a measurement of the well. Bills testified he went back to the farm, fired up the engine and in the presence of Eggenberger and his witness, John Dombier, the well was measured. The measurements showed 580 feet. Eggenberger ordered a test, and appellee on Monday afternoon pulled out two tanks of water of about twelve barrels each, and told Eggenberger to return next morning for a final test. Eggenberger did not come back the next, and on that afternoon appellee met Mr. and Mrs. Eggenberger in the bank at Odell for settlement. Mrs. Eggenberger stated that her lawyer had advised her she did not need to pay appellee anything, but that she would settle for \$73.00. Appellee testified that he did not know he had enough water to comply with the contract until after appellant ordered him to stop drilling. Several witnesses testified to the quantity of water in excess of the provisions of the contract.



The first ground of reversal urged is that the appellee declared on the common counts and filed a copy of the contract; that the evidence shows that the terms of the contract had not been complied with and that a four and one-half inch drill and casing was substituted for a six inch drill and casing and that part of the casing had been punctured with numerous holes, which was a departure from the terms of the contract; that in order to recover under the common counts on a written contract, it must be shown that the contract has been complied with and nothing remains to be done but to pay the money, and if recovery is sought upon a modification of a contract, then such modifications must be specially pleaded. In support of this contention appellant cited *City of Peoria vs. Druin-Brambrick Construction Company*, 169 Ill. 36; *Hart vs. Carsley Manufacturing Co.* 221 Ill. 444, and *Expanded Metal Fire Proofing Co. vs. Baylee*, 233 Ill. 284. Upon examination it will be found that none of these cases support the contention here made. The first case was a contract for paving a street. The contract provided for acceptance and approval of the work by the city engineer, and it was held that to warrant a recovery under the common counts for work done under a contract, the plaintiff must have completely performed his part of the contract, and under the pleading he would not be permitted to prove an excuse for its non-performance but must expressly allege such excuse in his declaration. In the last two cases it was held that where a contractor in a building contract had not obtained the architect's certificate showing the amount due as required by the contract, a recovery cannot be had upon the common counts, but the declaration must set up the contract, aver the performance, and state the reason why the certificate has not been obtained.

On the other hand, it has been repeatedly held that a recovery on a special contract may be had under the common counts where payment is the only duty remaining unperformed, and the contract may be read in evidence to determine its terms and



[illegible]



the measure of damages. *Shepard vs. Mills*, 173 Ill. 333; *Evans vs. Howell*, 211 Ill. 85; *Concord Apartment House Company vs. O'Brien*, 238 Ill. 360; *Expanded Metal Fire Proofing Co. vs. Boyce* 233 Ill. 209; *Peterson vs. Pusey*, 237 Ill. 209. It has also been held that a substantial compliance with the terms of a contract was sufficient, and where there has been no wilfull departure from the terms of the contract and no omission in essential points and the contract has been honestly and faithfully performed in its material and substantial particulars, recovery may be had, even though there have been technical and unimportant omissions and defects. *Keeler vs. Herr*, 157 Ill. 57; *Bauer vs. Hindley*, 232 Ill. 319; *Erickson vs. Ward* 266 Ill. 259; *Mason vs. Griffith*, 281 Ill. 255. Substantial means in substance, in the main, essential includes material and essential parts. A substantial compliance or performance means a compliance with the essential requirements of the contract. Substantial performance of the contract means performance in all the essential elements necessary to the accomplishment of the purpose of the contract. *People vs. Omen*, 290 Ill. 59. In *Peterson vs. Pusey*, *supra*, it was held that even though there were slight variations in some portions of the work, under the authorities, the contractor could still recover under the common counts. In *Concord Apartment House Co. vs. O'Brien*, *supra*, it was held that where a building contract provided that the superintendent of the building should be the agent of the owner, for the purpose of the contract, and where the amount due the contractor had been fixed by agreement of the parties and set out in the final certificate of the superintendent, the contractor's right to recover on the common counts was not defeated because he had made some change in the work at the verbal orders of the superintendent, even though the contract provided that such orders should be in writing, since such provision may be waived by either party. In *Erickson vs. Ward*, *supra*, it was held that if the owner ordered changes in the work and such



changes were made as requested, such changes should not be considered as a failure to perform the contract.

The appellee claims that he completely performed the contract except that with the consent of the appellant he had substituted four and one half inch pipe for six inch pipe and holes had been bored in the pipe. Whether he had in fact complied with the contract substantially as therein provided and whether the substitution of pipe was by agreement of the parties, was a question of fact for the jury. *Connelly vs. Wallin*, 181 Ill. App. 212, *Bauer vs. Hindley*, supra; *Peterson vs. Pusey*, supra; *Erickson vs. Ward*, supra. If the contract had been substantially complied with and the substitution of pipe was by agreement, then the appellee had the right to recover under the common counts, and it was not necessary to allege a departure from the terms originally agreed upon. We have already set out the principal evidence relative to the substitution of the four and one half inch pipe and the boring of the holes in the pipe. If the witnesses on behalf of the appellee are to be believed, this substitution was made, and the holes were bored, with the full knowledge and consent of the appellant and her husband. The jury saw fit to believe these witnesses and we do not think we would be justified in disturbing their finding in that regard. On the question as to whether the well produced the amount of water required under the contract, the evidence on behalf of the appellee was sufficient to support his contention and no evidence was offered by appellant on that point. The drilling ceased on June 9, 1921. Suit was commenced to the October Term, 1921. The exact date of the trial does not appear, but it was during the January Term, 1922, probably in February or March. Appellant had seven or eight months to test the well and ascertain whether the water complied with the contract. Apparently this was not done and no evidence was offered on this point, therefore we cannot say that this finding of the jury is not supported by the evidence.







Appellant complains that the court improperly permitted counsel for appellee to ask leading questions, and refused counsel for appellant the same privilege. Our attention is called to certain instances in which leading questions were permitted. The court should have sustained the objections, but we do not think any serious injury was occasioned thereby.

Appellant criticises the ruling of the court in permitting Leslie Bills to testify from his book or memorandum. He testified that the book was in the handwriting of his wife, but that it was dictated by him. The book was not offered in evidence, but was used to refresh his memory. The only items testified to by him were concerning the amount of tile, and the different sizes used in the well. The facts are not disputed on this point, and no harm was done by permitting him to so testify.

Appellee's third instruction told the jury that they had nothing to do with the quality of the water procured, and if the well, upon test, produced the quantity of the water called for, the contract was substantially complied with in that regard. The quality of the water was not mentioned in the contract, and there is no implied warranty that the water would be of any particular quality. Rankin vs. Weaver, 78 Ill. App. 86. Appellant complains of the word "test" in this instruction. The language is "If you believe from the evidence the well upon test produced the quantity of water called for" etc. There was no test made except the one made by appellee. No person would misunderstand the meaning of the word test as used in this instruction. The word is again used and its meaning defined in the appellee's fourth instruction. ~~xxxxxx~~ Appellant complains of appellee's fourth instruction which advised the jury that in order for appellant to take advantage of the provision of the contract permitting settlement at the rate of \$1.50 per foot, it was necessary that she should stop the work before water in sufficient quantities to comply with the contract had been



secured, and if sufficient water was secured, without further drilling she could not claim the benefit of this provision. The right to stop work under the contract must have been exercised before water was found in order for appellant to take advantage of this clause. The evidence shows there was no drilling after Eggenberger ordered the work stopped, except to clean the sand and debris from the well. There was no error in giving this instruction.

Appellant complains of the fifth and sixth instructions concerning the substantial performance of the contract except insofar as the jury might find the contract was modified as to the pipe. The only performance which is at all disputed is the substitution of the smaller pipe, and possibly as to the amount of water secured. The jury in appellee's third instruction was advised as to what constituted a substantial performance insofar as the procuring of the water was concerned. Under the instructions as a whole the jury were fairly instructed and they were not misled.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.





STATE OF ILLINOIS, }  
SECOND DISTRICT. { ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office. .

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
Apr. in the year of our Lord one thousand  
nine hundred and twenty- three

*Justus L. Johnson*  
Clerk of the Appellate Court.



7162 30953  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

WAh the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





7163

Richard O. Sharon, doing  
business as Sharon Coal  
Company,

appellee,

vs.

Central Illinois Light Company,  
a corporation,  
appellant,  
Partlow, J.

Appeal from Circuit  
Court of Peoria County.

Appellee, Richard O. Sharon, doing business as Sharon Coal Company, began an action of assumpsit in the circuit court of Peoria County against appellant, Central Illinois Light Company, a corporation, to recover \$2312.55, alleged to be due for coal delivered to appellant in February, 1918. At the close of the evidence, the court directed a verdict for appellee for \$2312.55 the amount claimed, together with interest at five per cent from March 15, 1918, to date, amounting to \$471.32, judgment was rendered against appellant for \$278<sup>3</sup><sub>8</sub>.87 and this appeal was prosecuted.

On November 12, 1915, the appellant and appellee entered into a written contract by the terms of which, from April 1, 1916, to March 1, 1918, appellee agreed to furnish appellant all of the coal required to operate appellant's electric light station at the foot of Liberty Street in the city of Peoria. Appellee was to keep a sufficient supply of coal available at all times at such plant to insure its continuous operation. If appellee failed in this, appellant was to purchase such deficiency elsewhere, and appellee was to reimburse appellant for the amount paid in excess of the contract price. The price was \$1.20 per ton f.o.b. cars at appellant's plant. The contract was signed by appellee and appellant and under their signatures was the following: "We guarantee the fulfillment of this contract by our agent, (signed)

1913

William L. Barker, doing

business as Barker Coal

Company,

appellee,

Appellant from Circuit

Court of Northern County,

vs.

Central Illinois Light Company,

a corporation,

appellant,

Petitioner, J.

Appeal, Circuit of Illinois, from judgment of Circuit

Court, entered on appeal of judgment of Circuit

Court of Illinois, entered on appeal of judgment of Circuit

Court of Illinois, entered on appeal of judgment of Circuit

Court of Illinois, entered on appeal of judgment of Circuit

Court of Illinois, entered on appeal of judgment of Circuit

appellee for \$1000.00 the amount claimed, together with interest

at five per cent from March 15, 1913, to date, according to

\$41.00, judgment was rendered against appellee for \$1041.00

and this appeal was prosecuted.

On January 15, 1913, the appellant and appellee entered

into a written contract by the terms of which, from March 1, 1913,

to March 1, 1915, appellee agreed to furnish appellant with the

coal required to operate appellant's electric light station at the

foot of Liberty Street in the city of Peoria. Appellee was to

keep a continuous supply of coal on hand at all times to meet

demand to insure the continuous operation. If appellee failed to

do so, appellee was to purchase coal at market prices, and

appellee was to reimburse appellant for the amount paid in excess

of the contract price. The price was \$1.00 per ton F.O.B. Peoria

at appellant's plant. The contract was signed by appellant and

appellee and under their signatures was the following: We

certify the truthfulness of this contract, by our hands, (Witness)

Cora Coal Company, by G. W. Solomon, Pres. Big Diamond Coal Company, by G. W. Solomon, Pres."

On May 19, 1917, this contract was modified by another written contract which provided that the original contract was to stand in all of its terms except as specifically changed or modified. The parties specified that the Black Diamond Coal Company and the Cora Coal Company were principals in the original contract, and that Richard O. Sharon was their joint and several agent with authority to make the original contract and to represent them as therein set forth, and to collect all money due for coal delivered under the original contracts as modified. It further provided that the price to be paid was to be increased to \$1.69 per ton; "that the sellers will, constantly, from the date hereon, until the 31st day of March, 1918, deliver in cars the 1 $\frac{1}{4}$  inch screenings contracted for, in such quantities as to meet all the requirements for screenings" of appellant at such plant. If appellant was required to pay more elsewhere, the sellers were to reimburse appellant for the price paid elsewhere in excess of \$1.30 per ton. This contract was signed by Cora Coal Company and Black Diamond Coal Company as principals and appellee as agent.

On February 15, 1918, the original contract as modified, was again modified by a written contract which recited that the two coal companies were the sellers and the appellee was the agent of the sellers; that a dispute had arisen between the sellers and the buyer as to whether the sellers had furnished the buyer sufficient coal to meet its requirements provided by the contract, the buyer contending that it had been compelled to buy coal elsewhere. The sellers agreed to execute and deliver to the buyer their promissory judgment note, dated February 15, 1918, due October 1, 1918 for \$13,000. with interest at six per cent per annum after maturity, the note to be signed by the two coal companies and by P. H. Solomon, George Solomon, Edward





Solomon, Robert Solomon, and Henry Solomon. The buyer in consideration of the execution of the note, agreed to pay Richard O. Sharon, agent of the sellers, according to the terms of the contract, for all coal delivered under the contract up to and including March 31, 1918, at \$1.65 per ton. The sellers acknowledged the payment of all monies due for coal furnished to January 31, 1918, at \$1.65 per ton, plus freight charges and it was further agreed from and after the date of contract, the buyer should, before purchasing coal to make up any deficiency under its contract, give the sellers, through their agent, Richard O. Sharon, notice of such deficiency so he might verify such claim on the part of the buyer, and check up the amount of coal to be purchased to supply the same, together with the price paid therefor. The buyer acknowledged full payment of all claims against the sellers and the agent, Sharon, the basis of which existed prior to February 1, 1918, growing out of the prior contract. The contract was changed and modified to meet the provisions of the agreement then executed, but all of the terms of the original contract, not in conflict with the terms and conditions of that agreement, were to remain in full force and effect. The power and authority given by the sellers to Richard O. Sharon to collect all money due the sellers from the buyer under the terms of the contract were to be irrevocable.

Appellant contends that the sellers failed to furnish appellant with the amount of coal required by it to operate its plant from February 1 to 14, 1918, and that appellant was compelled to buy, at a higher market price than that provided in the contract, sixty seven cars of coal for immediate use in order to keep the plant going. The excess over the contract price for the coal purchased was \$2313.55. The total bill for coal delivered during the month of February was \$20,363.01. Appellant deducted \$2313.55 the amount of the loss which it claimed to have sustained, and paid the balance of the bill. The coal companies refused to execute



a note to cover the \$2312.55 and appellant held this amount out when it paid its February bill. There is no dispute that appellant bought additional coal from other sources, or as to the price paid but the appellee contends that he had ample coal available to keep the plant in operation and the appellant did not buy outside coal on account of his default but bought it <sup>for</sup> ~~from~~ some other reason.

The first question for determination is whether or not the contract was violated and as a result thereof appellant was required to expend for extra coal \$2312.55 in excess of the contract price. With the exception of two exhibits and the testimony of one witness relative to the number of tons of coal usually consumed by appellant, there was no evidence offered by appellant in support of its contention concerning a default under the contract. The determination of the question at issue depends, therefor, upon the evidence offered by the appellee. It was stipulated that during the month of February, 1918, there was delivered to appellant, under this contract 8779 tons and 1500 pounds of coal of the value of \$20,105.63 which, together with a tax of \$157.38 made a total of \$20,263.01, and that of this amount the appellant paid \$17,950.45, leaving a balance of \$2312.55 unpaid, the amount for which this suit was brought. By this stipulation it is therefore admitted that if the appellee was not in default under his contract \$2312.55 was due from appellant. While the contract provided that the price should be f.o.b. cars at appellant's plant, and that appellee should keep a sufficient supply of coal available at all times to insure the continuous operation of the plant, the evidence shows that on September 20, 1917, H. N. Remington, the purchasing agent of appellant sent a letter to John M. Bath, General Superintendent of the Peoria and Pekin Union Railway, in which he stated that "our business has grown to such an extent that we feel the need of a traffic manager, and have employed Mr. W. C. McManus to look out for our shipments.



a note to cover the \$2312.55 and appellant said this amount was what it paid its February bill. There is no dispute that appellant bought appellant's coal from other sources, on or before the first half but the appellee contends that he had ample coal available to keep the plant in operation and the appellant did not buy coal on account of his default but bought it from some other reason.

The first question for determination is whether or not the contract was violated and as a result, appellant's contract is entitled to enforce for entire coal \$2312.55 in excess of the contract price. With the exception of two exhibits and the testimony of one witness relative to the number of tons of coal actually consumed by appellant, there was no evidence offered by appellant in support of its contention concerning a default under the contract. The determination of the question as to who is liable, therefore, under the evidence offered by the appellee. It was stipulated that during the month of February, 1916, there was delivered to appellant, under this contract 8775 tons and 1800 pounds of coal of the value of \$20,105.68 which, together with a ton of \$127.58 made a total of \$20,233.26, and that of this amount the appellant paid \$17,925.46, leaving a balance of \$2307.80 unpaid, the amount for which this suit was brought. By this stipulation it is further stated that if the appellee was not in default under his contract \$2312.55 was due from appellant. With the stipulation provided that the price should be \$2.00 a ton of appellant's coal, and that appellee should keep a sufficient supply of coal available at all times to insure the continuous operation of the plant, the evidence shows that on February 25, 1916, at Washington, the producing agent of appellant sent a letter to John W. Bass, General Superintendent of the Pacific and North Union Railway, in which he stated that "our business has grown so much an extent that we feel the need of a greater quantity, and have employed Mr. W. C. McNamee to look out for our interests."



Consequently we shall expect Mr. McManus to order all of the coal which arrives in town for us, and will ask that you withdraw such instructions as you may have outstanding with reference to the Sharon Coal Company and our coal, and substitute instructions covering the appointment of Mr. McManus as our representative. Mr. McManus may be reached on Branch 38, Main 3340, during the regular business hours of the company, and all reports of any incoming loads or matters pertaining to material for this company in carloads should be referred to him." A copy of this letter was sent to Richard O. Sharon. The effect of this letter was to revoke the power vested in Sharon to order and have set for unloading, the cars of coal provided for in the contract, and ~~vest~~ that authority in McManus. McManus under that order was to determine what coal was necessary at the plant from day to day, and to order coal which was in the yards sent to the plant and placed in the bunkers ready for use. After this date, the evidence shows that McManus, each morning, went to the office of the appellee, and got the numbers of the cars which had arrived in the railroad yards to be delivered to appellant, and directed when and where <sup>these</sup> cars should be placed so that the coal could be used by appellant, and for this reason Sharon paid no further attention to ordering the cars set at appellant's plant.

It is conceded that the appellant purchased outside coal during the first two weeks of February, but the question is whether this coal was purchased on account of appellee's failure to furnish a sufficient supply, or whether it was for some other reason. Sharon testified that when he found out that outside coal was being purchased he had a conversation with Remington about it, and Remington said the coal which was being purchased was "hang over" coal which had been shoved onto the appellant by the public fuel administrator from all of the mines around the district; that Remington told appellee not to worry, that

... Mr. McKenna to order all of the coal  
which arrives in town for us, and will see that you deliver such  
instructions as you may have outstanding with reference to the  
... McKenna Coal Company and our coal, and investigate instructions  
covering the shipment of Mr. McKenna as an expert witness.  
Mr. McKenna may be reached on Tuesday 22, Main 1215, during the  
regular business hours of the company, and all reports of any  
incoming loads or matters pertaining to material for this company  
is carefully should be referred to him." A copy of this letter  
was sent to Richard O. Sharon. The effect of this letter was to  
transfer the power vested in Sharon to write and have the coal  
loading, the care of coal provided for in the contract, and what  
that authority in McKenna. McKenna orders that order was to deliver  
with what coal was necessary at any time from day to day, and to  
transfer coal which was in the car to the plant and deliver  
to the buyers ready for use. After this date, the evidence shows  
that McKenna, each morning, went to the office of the defendant,  
and got the number of the cars which had arrived in the railroad  
yards to be delivered to applicant, and directed when and where to  
cars should be placed so that the coal could be used in applicant,  
and for this reason Sharon will no longer be shown to be exercising  
the care and of applicant's plant.  
It is contended that the applicant purchased certain coal  
during the first two weeks of February, but the question is  
whether this coal was purchased on account of McKenna's failure  
to furnish a sufficient supply, or whether it was for some other  
reason. Sharon testified that when he found out that the  
coal was being purchased he had a conversation with applicant  
about it, and Hamilton said the coal which was being purchased  
was "bang over" coal which had been shown to the applicant  
by the public fuel administrator from all of the other agencies  
the district; that Hamilton said applicant was to accept, but

the coal which was going in would not be charged against appellee on its contract. Sharon testified that during the first fifteen days of February, McManus told Sharon to let the coal come easy, as they had so much outside coal coming in, and they were compelled to pay demurrage on it, and did not have to pay demurrage on the coal coming from the appellee. He testified that February 8 and 9 appellant diverted five cars of coal furnished by appellee under the contract, to the plant at Sycamore, Illinois; testified that he was not advised by appellant, or any of its agents, of the requirements of coal from day to day; that all of the coal shipped in by appellee under the contract was not ordered set by appellant; that nobody connected with the appellant ever, at any time, during the month of February, notified him that he was not furnishing sufficient coal, or that more coal was required, or made any complaint of any kind or character. Fred W. Hobbs testified that he had a conversation with McManus with reference to the outside coal. He asked McManus, at various times, in the early part of February, why appellant was putting in this outside coal when there was coal on the track in the yards for delivery under the contract. McManus replied that the coal was "hang over" coal some of which had been there quite awhile, running up demurrage charges, and they wanted to get in. None of this evidence was disputed by <sup>the</sup> appellant.

Appellee's Exhibit No. 5 was admitted in evidence without objection and shows the number of carloads of coal shipped in each day, how many of them were delivered to the appellant, what was done with the balance, together with the number of cars purchased outside by appellant. This exhibit shows that on February 1, 1918, there were seventeen cars in the yard ready to be delivered to appellant, six of these cars were set at the appellant's plant and were unloaded, but appellant, notwithstanding this fact, purchased three car loads of coal, from the outside. On February 2, fourteen cars were in the yard, eight cars were set and two cars were purchased from the outside. On February 3, six cars were in



the coal which are going in would not be changed against appellants on the contract. Appellant testified that during the first fifteen days of February, McManus told Spurgeon to let the coal come early, as they had so much outside coal coming in, and they were compelled to pay demurrage on it, and did not have to pay demurrage on the coal coming from the appellee. He testified that February 8 and 9 appellant diverted five cars of coal furnished by appellee under the contract, to the plant at Sycamore, Illinois; testified that he was not advised by appellee, or any of its agents, of the requirements of coal from day to day; that all of the coal shipped in by appellee under the contract was not stored up by appellee; that nobody connected with the appellee knew at any time, during the month of February, notified him that it was not furnishing sufficient coal, or that more coal was required, or made any complaint of any kind or character. Fred W. Spurgeon testified that he had a conversation with McManus with reference to the outside coal. He asked McManus, at various times, in the early part of February, why appellee was putting in this outside coal when there was coal on the track in the yards for delivery under the contract. McManus replied that the coal was "hang over" coal some of which had been there quite awhile, running up demurrage charges, and they wanted to get it. None of this evidence was disputed by appellee.

Appellant's Exhibit No. 3 was admitted in evidence without objection and shows the number of carloads of coal shipped in each day, how many of them were delivered to the appellee, and how many were delivered to the outside. It also shows the number of cars purchased by appellee. The exhibit shows that on February 1, 1911, there were seventeen cars in the yard ready to be delivered to appellee, six of these cars were not at the appellee's plant and were unloaded, but appellee, notwithstanding the fact, unloaded five cars loads of coal, from the outside. On February 2, fourteen cars were in the yard, eight cars were not and two cars were purchased from the outside. On February 3, six cars were in



the yard, five cars were set and five cars were purchased from the outside. On February 4, six cars were in the yard, four cars were set, three cars were unloaded, one car was put in storage, and seven cars were purchased from the outside. On February 5, nine cars were in the yard, one car was set, and seven cars were purchased. On February 6, twelve cars were in the yards, four cars were set, and nine cars were purchased. On February 8, twenty one cars were in the yard, five cars were set, four cars were unloaded, one was put in storage, and seven cars were purchased. On February 9, eighteen cars were in the yard, no cars were set, but nine cars were purchased. On February 10, twenty five cars were in the yard, ten cars were set. On February 11, twenty seven cars were in the yard, nine cars were set, five cars were unloaded, four put in storage and three were purchased. On February 12, twenty four cars were in the yards, seven cars were set and five cars were unloaded, two were put in storage, and three cars were purchased. On February 13, twenty seven cars were in the yards, eight were set, and three cars were purchased. On February 14, twenty three cars were in the yard, eight cars were set, seven cars were unloaded, one was put in storage and two were purchased. On February 15, twenty five cars were in the yard, twelve were set. On February 21, twenty three cars were put in the yards, nine were set and one was purchased. On February 22, twenty three cars were in the yard, twelve cars were set, and one was purchased. On February 24, nine cars were in the yards, five were set and two were purchased.

Attached to appellee's declaration was a statement of account, and the declaration was verified. The general issue was filed, and accompanying it was an affidavit which alleged that in February, 1918, appellee, on different days, failed and refused to deliver the quality of coal provided in the contract, that the appellant gave the plaintiff notice of such failure and requested that coal be forthwith delivered and if it was not delivered that other coal would be purchased and the difference charged to the plaintiff; that during February, on many different days, appellant

the yard, five cars were not and five cars were purchased from  
the outside. On February 4, six cars were in the yard, four  
cars were not, three cars were unloaded, one car was put in  
storage, and seven cars were purchased from the outside. On  
February 5, nine cars were in the yard, one car was not, and  
seven cars were purchased. On February 6, twelve cars were in  
the yard, four cars were not, and nine cars were purchased. On  
February 7, twenty one cars were in the yard, five cars were not,  
four cars were unloaded, one was put in storage, and seven cars  
were purchased. On February 8, eighteen cars were in the yard,  
no cars were not, and nine cars were purchased. On February 9,  
twenty five cars were in the yard, ten cars were not, on February  
10, twenty seven cars were in the yard, nine cars were not, five  
cars were unloaded, four put in storage and three were purchased.  
On February 11, twenty four cars were in the yard, one car was  
not, and five cars were unloaded, two were put in storage,  
and three cars were purchased. On February 12, twenty seven  
cars were in the yard, eight cars were not, and three cars were  
purchased. On February 13, twenty three cars were in the yard,  
eight cars were not, seven cars were unloaded, one was put in  
storage and two were purchased. On February 14, twenty five  
cars were in the yard, twelve cars were not. On February 15, twenty  
three cars were in the yard, nine cars were not and one was  
purchased. On February 16, twenty three cars were in the yard,  
twelve cars were not, and one was purchased. On February 17,  
nine cars were in the yard, five cars were not and two were purchased.  
Attached is copy of the defendant's affidavit and a statement of account,  
and the defendant was notified. The grand jury was then  
and recommending it and he withdrew and did not return in February,  
1916, respectively, on different days, and it was found that  
the quantity of coal furnished to the defendant was the same  
and the plaintiff notices of each failure and requested that order  
be forthwith delivered and if it was not delivered that order  
shall would be purchased and the difference charged to the plaintiff.

after such notice, purchased the necessary coal at the then ruling market price, and in consequence thereof was required to pay \$2312.55, difference between the contract price and the market price. Not a word of evidence was offered by appellant in support of this sworn plea. The evidence on behalf of appellee clearly made out his case as alleged in his declaration. The mere fact that the appellant did purchase sixty seven cars of coal was not sufficient to overcome the case made by the appellee. The only ground on which the purchase of these sixty seven cars could create any liability against the appellee, would be on account of the failure of the appellee to keep a sufficient supply of coal on hand to insure the continuous operation of the plant. Appellee's exhibit 5, shows that from February 1 to 24, three hundred nine cars were in the railroad yard, subject to the orders of the appellant under the contract, and of this number only one hundred thirteen were set at appellant's plant ready to be unloaded. Appellant concedes that during the month of February, two hundred eighty two cars were unloaded at its plant, of which two hundred six were delivered by appellee. From all of this evidence, the most of which is undisputed, it appears that the appellee, at all times, had in the railroad yards more than enough cars to supply the plant and to cover all of the coal which the appellant claims it was required to purchase on the market. It appears that the appellee was ready, willing and able to comply with the contract, that the coal was not purchased from the outside because of appellee's default, but was purchased for some other reason outside of the contract.

Appellant insists that the court was in error in allowing interest on the amount due. Section 3, Chapter 74 of the Statute provides that a creditor shall be allowed interest at the rate of five per cent per annum on money withheld by an unreasonable and vexatious delay in payment. Mere delay is not sufficient to authorize the recovery of interest, but the delay must be both



[illegible]



unreasonable and vexatious. Peoria Grape Sugar Company vs. Turney, 70 Ill. App. 589; Union Elevated Railway vs. Nixon, 99 Ill. App. 502; Reeb vs. Bronson, 196 Ill. App. 518; U. S. Brewing Company vs. Dolese, 383 Ill. 588. The question as to whether the delay is both unreasonable and vexatious must be determined from the facts of the particular case. In some cases there might be a difference of opinion from the facts as to whether the delay was both unreasonable and vexatious. The facts here presented show that the appellee performed his contract in full. No evidence was offered by appellant to sustain the claim sworn to by it in its plea, or to show, or even tend to show, that the conditions of the contract were not complied with. Under these circumstances we cannot say that the delay was not both unreasonable and vexatious. The court was not in error in allowing interest.

Appellant insists that Sharon cannot maintain this suit in his own name for the reason that he has no legal or equitable claim in the subject matter of the litigation; that he was only the agent of the two coal companies, and that they should have instituted suit. The first contract was between the appellant and the appellee and the appellant agreed to pay appellee according to the terms of the contract for all coal delivered. The contract of May 19, 1917, contained the same provisions and also provided that all of the terms of the original contract should remain in full force and effect except as modified by contract of May 19, 1917. The contract of February 15, 1918, provided that the power and authority given by the sellers to Richard O. Sharon to collect all the monies due sellers from the buyers under the contract was irrevocable. Where one person, for a valuable consideration, promises by a simple contract, to pay money to a third person, such third person may maintain an action for the breach of the contract. It is not necessary that the consideration should move from the third person if he elects to affirm the

...should move from the third person to be elected to either the  
branch of the contract. It is not necessary that the contract  
third person, such third person may maintain an action for the  
consideration, provided by a simple contract, to pay money to a  
third person, or to deliver property to a third person. Where one person, for a valuable  
consideration, has sold all the goods and chattels from the estate of a  
person to collect all the debts due to him, and has assigned to himself  
that the power and authority given by him to collect the debts, and  
of May 18, 1917. The contract of February 18, 1917, provided  
remain in full force and effect except as modified by contract  
provided that all of the terms of the original contract should  
contract of May 18, 1917, contained the same conditions and was  
ing to the terms of the contract for all and delivered. The  
and the appellee and the appellee agreed to pay appellee's  
involved suit. The first contract was between the appellee and  
the agent of the two coal companies, and that they should have  
claim in the subject matter of the litigation; that he was only  
his own name for the reason that he was not a party to the  
Appellant insists that Sharon cannot maintain this suit in  
not in error in allowing Sharon to maintain this suit.

promises made in his behalf and does affirm it by bringing suit upon it. Commercial National Bank vs. Kirkwood, 172 Ill. 563. Appellee under the terms of the contract and under the evidence was the proper plaintiff and had the right to maintain the suit in his own name.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

promised to be in his cell and that he was by bringing this  
... ..  
Appeared under the terms of the contract and under the evidence  
was the proper plaintiff and had the right to maintain the suit  
in his own name.

We find no reversible error and the judgment will be affirmed.  
Judgment affirmed.



STATE OF ILLINOIS, {  
SECOND DISTRICT. { ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30<sup>th</sup> day of  
Apr . in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.



7167  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October,  
in the year of our Lord one thousand nine hundred and  
twenty-two, within and for the Second District of the State  
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS A. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

229 I.A. 6574

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BE IT REMEMBERED, that afterwards, to-wit: on  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





J. Fred Lewis,

appellee,

vs.

Henry J. Sand,

appellant,

Appeal from the Circuit

Court of Henry County

Partlow, J.

Appellee, J. Fred Lewis, began suit before a justice of the peace in Henry county against the appellant, Henry J. Sand, to recover \$200.00 alleged to be due appellee under a contract for the sale and exchange of real estate. Judgment was entered against appellant for the full amount and he appealed to the circuit court of Henry county, where there was a trial by jury, verdict for the full amount, and from the judgment entered upon the verdict this appeal was prosecuted.

There is no dispute as to some of the facts, but there is a dispute as to many of them. It is undisputed that in August, 1916, S. F. Weston made a contract to sell 320 acres of land to G. A. Pobanz and Ruddle Pobanz for \$60,000.00, to be paid, \$3000.00 in cash, and \$57,000.00 in 1937. Subsequently Pobanz made a contract to sell this land to William F. Meyer. In 1919, Meyer entered into a contract to sell the land to the appellant and to take other real estate in payment therefor. On December 20, 1919, appellee and appellant entered into a written contract by the terms of which the 320 acres were sold to the appellee. Appellee was to assume the original deferred payment of \$57,000.00 due Weston, was to pay the appellant \$3000.00 in cash on March 1, 1920, and was to deed to the appellant 80 acres of land which belonged to the appellee. The appellant agreed that he would assign, or have assigned, to the appellee, the contract between Pobanz and Weston on or before March 1, 1920, subject to a lease to Caesar Hudders for one year from

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March 1, 1920. Appellant agreed to accept \$20,000.00 on February 15, 1920, for the 80 acres which appellee was to deed to him provided appellee decided to keep the 80 acres and pay to appellant its market price, in which event the appellant agrees to "carry back \$14000.00 on said land for three years at five per cent interest per annum for the party of the second part or whoever he might designate."

Appellant contends that later an oral agreement was entered into between the appellant and the appellee by the terms of which it was agreed that if appellee decided to keep the 80 acres, then appellant was not to carry the \$14,000.00 loan, but the appellee was to deduct \$200.00 from the \$20,000.00, and pay the balance to appellant in cash. It is over the payment of this \$200.00 that this law suit arose. Appellant claims that appellee did not pay ~~xxx~~ the \$3000.00 which was to be paid in cash, did not pay the \$20,000.00 nor any part thereof, and for that reason appellant was relieved from his obligation to accept the \$20,000.00, or to carry the loan of \$14,000.00; that on February 16, 1920, appellee told appellant the time for the payment of the money had expired, appellee had changed his mind about making the trade, would not carry out the deal, and the deal was never completed; that on February 27, 1920, appellee, without the knowledge or consent of appellant, secured an assignment to appellee of the original contract for the 320 acres made in August, 1916, from Weston to Pobanz; that on March 1, 1920, appellant and Meyer went to see appellee. Meyer stated to appellee that it was agreed that both parties were to be released from all obligations under the contract and appellee replied "All right, we will go to Mr. Bills' office and get the contract." They went to the office of C. M. Bills, got the contract between the appellant and appellee, then went to the office of Phineas Morrow and appellant assigned to appellee the Hudders lease, whereupon the contract of December 20, 1919, was torn up and destroyed by the appellant and all obligations between the

March 1, 1934. Appellant agreed to accept \$25,000.00 on January 15, 1934, for the 50 shares which appellant was to hold on the day which appellant reached to meet the 50 shares and pay for appellant the matter which, on which basis the appellant agreed to "carry back \$100,000.00 on said bond for three years at five per cent interest per annum but that party on the second part of November he might resign."

Appellant continues that after on each agreement was entered into between the appellant and the appellee on the terms of which it was agreed that if appellee decided to keep the 50 shares, then appellant was not to carry the \$100,000.00 loan, but the appellee was to receive \$100,000.00 from the \$25,000.00, and pay the balance to appellant in cash. It is over the payment of this \$100,000.00 that this law arose. Appellant claims that appellee did not pay him the \$100,000.00 which was to be paid in cash, but that the \$25,000.00 was not paid at all, and that the 50 shares were not delivered to him. The appellee is alleged to have paid the loan of \$100,000.00; that on February 15, 1934, appellee told appellant the time for the payment of the money had expired, appellee had changed his mind about making the loan, and that he had not paid the loan, and the fact was never disclosed that on February 17, 1934, appellee, without the knowledge or consent of appellee, secured an assignment to appellee of the original and first lot of the 50 shares which he bought, 1934, the parties in fact, that on March 1, 1934, appellee and his wife went to see appellee, where there is evidence that it was agreed that the parties were to be released from all obligations under the terms of the agreement. Appellant "all rights, he will be in the office of the law firm of the county." They went to the office of the law firm of the county, where the appellant and appellee, from that time on the office of the law firm and appellant agreed to release the parties from all obligations, and appellant is, this, was taken up



parties ended.

Appellee does not agree with these contentions of the appellant. It is admitted by the appellee that the various contracts of sale for the 320 acres were made as above recited, and that on December 20, 1919, appellant and appellee entered into the contract by the terms of which appellee purchased the 320 acres of appellant; that under the terms of his contract with appellant, appellee had the option, either to deed his 80 acres to the appellant or keep it, and if he kept it he was to pay \$20,000.00 in lieu of the conveyance. In January, 1920, about one month after his contract with appellant, he sold his 80 acres to C. E. Sward, and appellant was notified of this sale, and that Sward wanted the loan of \$14,000.00 as specified in the contract of December 20, 1919; that appellant stated to both of them that he could not furnish the \$14,000.00; that appellant had previously offered C. M. Bills \$200.00 to procure the loan, and later appellant made the same offer to appellee. Appellee claims that he secured the loan of \$14,000.00 from Sward, and paid Sward \$200.00 for furnishing it: that on March 1, 1920, the contract of December 20, 1919, between appellant and appellee was fully consummated by mutual agreement between them; that appellant assigned in writing to appellee all of his interest in the 320 acres, but appellant's act of destroying the contract and assigning the interest did not relieve the appellant from paying the \$200.00 which he had agreed to give appellee for obtaining the loan of \$14,000.00 which appellee obtained from Sward.

It is urged by appellant as grounds for reversal that the case was tried upon the theory that the parcel agreement relative to the \$200.00 to be deducted from the \$20,000.00 to be paid February 15, 1920, under the contract of December, 1919, was a separate and independent contract, and enforceable regardless of whether the contract of December 20, 1919, had been carried out, abandoned or settled, and regardless of whether appellee paid the \$20,000.00 to the appellant, and even though appellee paid the \$20,000.00 he was



entitled to the discount on it. Appellant's position is that the supposed agreement in regard to the \$200.00 was predicated upon the contract of December 20, 1919, and was not enforceable unless the original contract was carried out, abandoned or settled; that there never was the slightest attempt on the part of the appellee to carry out his obligation contained in that contract; that if it be conceded that the verbal agreement changed the terms of the written contract under seal and was an independent contract, the appellee still would not be entitled to recover because there was a total failure of consideration for the reason that the appellee did not pay the \$20,000.00 before February 15, 1920. It is further contended by appellant that the verbal agreement changed the terms of the written contract under seal which could not be done under the law.

Many authorities are cited by appellant in support of his contention that the terms of an executory contract under seal cannot be changed by parol; that evidence is admissible to show that a contract under seal has been abrogated, cancelled and surrendered by an executed contract, but not to change its terms; that an oral agreement that a payment stipulated in a sealed contract is not to be made in a certain event, is not equivalent to a new contract, but is in effect a modification of the existing contract. We do not deem it necessary to review these authorities for the reason that they do not apply to the facts here presented.

The evidence shows that Weston was the original owner of this 320 acres. He entered into a contract of sale with Pobanz. Later Pobanz entered into a contract of sale with Meyer. Meyer entered into a contract with appellant, who entered into a contract with appellee. These four contracts covered a period of over three years. What were the terms of all of these contracts and what was done under each of them does not appear from the evidence, but it does appear that during all this time the title remained in Weston. On the date of the contract between appellant and appellee the former







did not have title to the 320 acres which he contracted to convey to appellee, but appellee did have title to the 80 acres which he was to convey to appellant. How appellant expects to get title to the 320 acres is not disclosed. There is no evidence of any steps taken by appellant to obtain title before March 1, 1920, when he was to convey to appellee. There is a provision in the contract of December 20, 1919, that the covenants, agreements and conditions of the conveyance are to be stipulated mutually in an instrument between the parties to be executed not later than March 1, 1920. What these stipulations were to be does not appear, and therefore it must be held that this contract is not very definite and certain as to the conditions under which the conveyance was to be made. This is material in determining whether or not the terms of the contract were in fact carried out by the parties. The evidence of C. M. Bills is that shortly after this contract was executed on December 20, 1919, appellant told Bills that he could not furnish the \$14,000.00 in case appellee elected to keep the 80 acres, and appellant offered Bills \$200.00 to secure a loan for that amount. On January 10, 1920, appellee sold the 80 acres <sup>to</sup> ~~to~~ C. E. Sward for \$22,000.00 and a written contract of sale was executed between them. This contract provided that Sward, on March 1, 1920, was to pay to appellant \$8,000.00 in cash, and was to give a mortgage on the 80 acres to appellant for \$14,000.00 due in three years at five per cent. Under the terms of this last contract it is apparent that appellee was trying to carry out the terms of his contract of December 20, 1919, with appellant. Otherwise, he would not have made the \$8,000.00 payable to appellant and provided that the mortgage for \$14,000.00 was to be made to appellant. A few days after this contract was executed between appellant and Sward, appellee told appellant the 80 acres had been sold to Sward and Sward was the man who would want the \$14,000.00. This was also in strict compliance with the contract of December 20th, which provides that appellant would carry the \$14,000.00 on the 80 acres for appellee or any person he might designate. Appellee designated Sward as



he had a right to do. At this same time and in this same conversation, when appellee told appellant of the sale to Sward, and appellant told appellee he could not raise the \$14,000.00 necessary to carry the mortgage, appellee testified that appellant said he would give appellee \$200.00 to find someone who would loan that amount. Appellant admits that he offered \$150.00 for this purpose, but that it was to be deducted from the balance to be paid for the land. We do not think there is any legal distinction between the terms used by appellant and those used by appellee. Appellant testified the \$150.00 or \$200.00 was to be deducted from the balance due on the land, while appellee testified that appellant agreed to pay him \$200.00 for securing a loan of \$14,000.00. The most that can be said of the respective contentions is that appellant in his written contract of December 20, 1919, agreed to do certain things in case appellee elected to retain the 80 acres. Appellant failed to keep his agreement in this respect. Consequently appellee secured the loan from Sward, and as he claims, paid Sward \$200.00 therefor, which has never been repaid by the appellant. We do not think this agreement relative to the \$200.00 varied the terms of the written contract by parol evidence, but it was a separate agreement made for appellant's benefit when he failed to comply with his valid contract of sale. He was the one who was in default up to the date this parol agreement was made, and whether the \$200.00 be considered as a payment for services rendered, or as a deduction from the amount due on the land is immaterial. If the jury believes the evidence of the appellee, the contract for the \$200.00 was made by the appellant, Sward loaned the \$14,000.00, appellee paid Sward \$200.00 for the loan, that amount has never been repaid by appellant and was a valid claim against him.

It is also claimed by appellant that he is not liable for the \$200.00 for the reason that the contract of December 20, 1919, was never carried out or consummated by the appellee. As we have already pointed out, the terms of this contract are not very clear







or definite. The exact terms under which the conveyance of the 320 acres was to be made, were not stated, but were to depend upon a stipulation to be entered into before March 1, 1930. The evidence shows that on February 27, 1930, appellee secured from Weston an assignment of this contract with Pobanz. On March 1, 1930, appellee paid Pobanz, \$23,000.00 in cash and assumed the balance of the \$57,000.00 due on the contract with Weston. By these acts he was placed in the same position with reference to the Weston contract which Pobanz had previously occupied. On March 1, 1930, there was a meeting between the appellant and appellee. The contract of December 30, 1919, was obtained from Bills and was destroyed by appellant and thrown into the waste basket. The lease executed by appellant to Hudders for the 320 acres was assigned to appellee. The language used in that assignment which is on the lease is as follows: "It is mutually agreed between Henry W. Sand and J. Fred Lewis that the said Lewis has heretofore purchased the interest of said Sand in the real estate described in the within lease, and that the said Lewis purchased said interest with the understanding that Caesar Hudders had a lease on the said premises for the year ending March 1, 1931. Wherefore the said Henry W. Sand does hereby sell, assign, transfer and set off unto the said J. Fred Lewis all his right, title and interest in and to the within lease." The claim of appellant that appellee did not purchase appellant's interest in the 320 acres, and that the contract was not consummated, is not in accord with the language in this written assignment. The language used is "that the said Lewis has heretofore purchased the interest of said Sand in the real estate." It does not say whether he purchased that interest from Sand, or from Pobanz, or what were the terms of settlement, but it is apparent from this written instrument that there was some kind of a settlement between appellant and appellee on March 1, 1930, and that appellee purchased appellant's interest in the 320 acres. This

of delivery. The same terms under which the government of the  
SIO order was to be made, were not offered, but were in fact  
upon a condition to be entered into before March 1, 1934. The  
witness stated that on February 27, 1934, appellant advised that  
before an assignment of this order could be made, the balance of  
\$25,000.00 had to be paid to the company by March 1, 1934.  
The balance of the \$25,000.00 was in the company's hands. It  
thereafter was placed in the same position with reference to  
the action contract which appellant had previously assigned. On  
March 2, 1934, there was a meeting between the appellant and  
appellant. The contract of December 27, 1933, was assigned  
from Alice and was assigned by appellant and it was then that  
witness learned. The letter provided by appellant to witness on  
the SIO order was assigned to appellant. The letter stated that  
that assignment was to be on the basis of the following: "It is  
mutually agreed between Alice S. and the SIO order that  
the said letter was heretofore purchased and assigned to Alice  
and in the said letter mentioned as the order of the SIO order;  
the said letter purchased was assigned to Alice and it was then  
that appellant learned and a letter on the said purchase was then  
then dated March 1, 1934. Appellant the said letter of the SIO  
then hereby will, assign, transfer and set off with the said SIO  
The letter will be given, this and assigned to Alice S. and it was  
then." The letter of December 27, 1933, was assigned to  
appellant's interest in the SIO order, and this fact witness was  
not contradicted, it was in accord with the evidence in this matter  
assignment. The letter stated that the said letter was assigned  
to the purchase of the SIO order and it was then that  
that was not mentioned in the letter that it was assigned to Alice  
Roman, so that was the fact of the assignment, but it is significant  
that the witness testimony was that the said letter was assigned  
to the SIO order and it was then that the said letter was  
assigned to the SIO order and it was then that the said letter was

settlement apparently was satisfactory to both parties in all respects except as to the \$200.00. The evidence does not sustain the contention of appellant that he was released from the payment of the \$200.00 because the contract was not consummated by the appellee.

The appellant contends that the court improperly admitted in evidence the contract between the appellee and Sward and the evidence of the negotiations concerning the same; the contract between Weston and Pobanz; the lease between appellant and Hudders; improperly permitted appellee to testify that he paid the \$200.00 to Sward; improperly permitted Renard to testify concerning the \$200.00; improperly refused to permit appellant to testify to his understanding concerning the settlement between him and appellee; and improperly refused to permit Meyer to testify to a conversation over the telephone with Bills. We have examined each of these rulings and find no error in any of them. The contract of December 20, 1919, expressly provides that the appellant should obtain an assignment of the contract from Weston to Pobanz and that the conveyance to appellee should be subject to the lease to Hudders. The contract was never assigned to appellant but it was assigned to appellee and was one link in his chain of title showing that he had secured title to the 320 acres. It was the basis of the contract of December 20, 1919, and without it that contract was of no effect. The lease to Hudders was assigned by appellant to appellee. Part of that assignment was material for the reason that the assignment not only was provided for in the contract, but the assignment itself recited, as we have before stated, that the appellee had purchased the interest of appellant in the land. All the facts concerning the sale to Sward of the 80 acres were material for the reason that they were provided for in the contract. Appellant was fully informed concerning them and the evidence was that he agreed to pay the \$200.00. Appellee not only had a right to prove the agreement but he also had a right to prove the \$200.00 was paid.







Appellant was permitted to testify fully concerning the settlement with appellee, but he did not have the right to testify relative to his understanding of that settlement. The conversation over the telephone between Bills and Meyer was not competent for the reason that the evidence did not show that Bills was the agent of appellee at that time or for all purposes. It did show that in drawing the contract Bills was the agent of both parties and it also shows that he was the agent of Pobanz in the final settlement. As far as the final settlement was concerned, appellee acted for himself, Bills was not his agent, and therefore the conversation between Bills and Meyer was incompetent.

Complaint is made of one instruction given on behalf of appellee and five instructions refused on behalf of appellant. All of the instructions given and refused are not in the abstracts. It has been held in numerous cases that alleged errors in instructions will not be considered on appeal unless all of the instructions are set out in full in the abstract. *Carlinville vs. Laager*, 129 Ill. App. 647; *Gary vs. Beadles*, 192 Ill. App. 459; *People v. Flannigan*, 204 Ill. App. 542; *Conrad vs. Stevens Bros.*, 205 Ill. App. 494; *City of Roodhouse vs. Christian*, 158 Ill. 137.

Seven special interrogatories were asked by the appellant and refused by the court and this was assigned as error. The court submitted to the jury two interrogatories which covered all of the points necessary to be submitted to the jury and there was no error in refusing those asked by the appellant.

On the motion for new trial, appellant presented one affidavit alleging misconduct of certain jurors consisting of conversations between jurors and appellee and his relatives. Several counter affidavits were filed by appellee denying all of the facts set out in the original affidavits. A motion was made by the appellant to strike the counter affidavits from the files, which motion was denied by the court and this ruling is assigned as error. These counter affidavits were properly filed and the court properly refused to strike them from the files. *Sparks v. Scharlaw*, 171 Ill.



App. 155; Drainage Commissioners vs. Knox, 237 Ill. 148. These affidavits are not in the bill of exceptions and therefore are not subject to review by this court. Drainage Commissioners v. De La Vergne, 298 Ill. 480.

We find no reversible error and judgment will be affirmed.

Judgment affirmed.





STATE OF ILLINOIS, }  
SECOND DISTRICT. { ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 30th day of  
Apr. in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.



R. H. Adair  
7126

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April,  
in the year of our Lord one thousand nine hundred and  
twenty-three, within and for the Second District of the State  
of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





Gen. No. 7136.

Agenda No. 19.

S. J. HURD, Appellant

vs.

MARGARET B. KIRK, Appellee.

Appeal from the Circuit  
Court of DeKalb County.

Jett, J.

S. J. Hurd, appellant, began suit in the Circuit Court of DeKalb County against Margaret B. Kirk, appellee, to recover \$6360.00 which he claimed was due him for the sale of certain real estate. Upon issue being joined there was a trial by jury and at the close of the evidence for the appellant the court instructed the jury to return a verdict in favor of appellee. Judgment was rendered against appellant for costs of suit, from which judgment appellant prosecuted this appeal. The only question to be considered is whether or not there was evidence in the record fairly tending to prove the material averments of appellant's declaration sufficient to require the cause to be passed upon by a jury.

The evidence discloses the fact that appellee and her husband, Jonathan Kirk, were the owners of one Hundred forty eight acres of land which they placed in the hands of appellant for sale. The contract was that appellee and her husband were to receive \$19,240.00 net to them for their farm and the appellant was to receive any amount in excess thereof for making the sale. Appellant secured purchasers in the persons of Paul and Anna Fenwick, who entered into a written contract to purchase the farm for \$26,000.00, which was to be completed by March 1st, 1920; one Henry Mouden, who was related to the Fenwicks, was a party to the contract but by a subsequent agreement of the purchasers his name was omitted

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WILSON, J. H. 1910.

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On the 11th day of the month of June, 1900, the appellant, being duly sworn, testified that he had been arrested by the police of the City of New York, and taken to the City Jail, where he was held for the purpose of recovering the sum of \$100.00 which he claimed was due him for the sale of certain real estate. Upon issue being joined there was a trial by jury and at the close of the evidence for the appellant the court instructed the jury to return a verdict in favor of the appellant. Judgment was rendered accordingly and the appellant was released from custody. The appellant proceeded to appeal. The only question for consideration was whether or not there was evidence in the record fairly tending to prove the material averments of appellant's declaration sufficient to require a case to be passed upon by a jury.

The evidence disclosed that they had applied  
and had been granted, Louisiana State Bank,  
in which they placed a deposit of \$100,000.  
The balance of the funds was held in the  
bank and the bank was to receive the interest  
on their loan and the bank was to receive  
the amount in cash from the bank and the bank  
was to receive the interest on the loan and the  
bank was to receive the interest on the loan.

when the papers were made out. At the time the contract for the sale of the farm was signed by appellee and her husband, a memorandum was also signed by them and by appellant, reciting that in consideration of the sale of the farm by appellant, he was to accept certain trust deed notes provided for in the contract in lieu of cash as compensation for selling the farm.

It appears from the evidence that after the farm had been listed with appellant, he showed it to several prospective purchasers. In the month of September, 1919, appellant took Paul and Anna Fenwick, and Henry Mouden, father of Anna Fenwick, and showed them the farm. The Fenwicks and Mouden examined the farm and inspected the buildings thereon. The farm was priced to Fenwick at \$185.00 per acre; Fenwick thereupon stated that they would buy the farm for \$26,000.00, and the husband of appellee stated that his wife, Mrs. Kirk, the appellee herein, was the boss and that they had better confer with her before closing the deal; a conference was had between appellant, Fenwick, appellee, and her husband, and appellee agreed to the sale of the farm for \$26,000.00. On the day following, September 15, 1919, appellant had the contract drawn up for the Fenwicks and Mouden, and appellee and her husband to sign; the contract of sale introduced in evidence was signed on said last named date by the Fenwicks and Mouden. On September 16th, 1919, appellee, together with her husband, executed the contract and the memorandum hereinbefore referred to. On the 15th of September, 1919, when the contract was executed by the Fenwicks and Mouden, Paul Fenwick gave appellant a check payable to the order of appellee for \$1500.00 as first payment on the purchase price of the farm. On the

when the papers were made out. At the time the contract  
for the sale of the farm was signed by applicant and her  
husband, a memorandum was also signed by them and by  
applicant, reciting that in consideration of the sale of  
the farm by applicant, he was to receive certain trust  
deed notes provided for in the contract in lieu of cash  
of compensation for selling the farm.  
It appears from the evidence that after the  
farm had been listed with applicant, he showed it to  
several prospective purchasers. In the month of Sept-  
ember, 1912, applicant took Paul and some friends, and  
Henry Moshel, father of Anna Moshel, and showed them  
the farm. The Moshels and some friends of the farm had  
inspected the property before. The farm was listed  
at \$1000.00 per acre; between that time and the  
time they would buy the farm for \$20,000.00, and the  
husband of applicant showed the farm to Mrs. Moshel,  
the applicant's sister, who had been married and had  
her contact with her before signing the deed; a sister-  
also was had between applicant, Moshel, applicant, and  
her husband, and applicant agreed to the sale of the farm  
for \$20,000.00. On the day following, September 12, 1912,  
applicant had the contract drawn up for the purchase and  
Moshel, and applicant and her husband to sign; the contract  
of sale recited in evidence was signed on that day  
named date by the Moshels and husband. On September 12,  
1912, applicant, together with her husband, executed the  
contract and the memorandum previously referred to, on  
the 12th of September, 1912, when the contract was signed  
as by the Moshels and Moshel, Paul Moshel gave applicant  
a check payable to the order of applicant for \$20,000.00 as  
first payment on the purchase price of the farm. On the



day that appellee and her husband signed the contract of sale, appellee gave appellant a check for \$500.00 to apply on his compensation for the making of the sale of the farm. It appears that some time subsequent to the execution of the contract of sale, Jonathan Kirk, husband of appellee, requested appellant to have all papers ready by March 1st, 1930; appellant communicated with the Fenwicks and Fenwick employed one Judge Reck to draw the trust deed and the trust deed notes as provided in the contract of sale and the memorandum. The trust deed and the notes were drawn and executed by Paul and Anna Fenwick and by Henry Mouden, and left in the custody of Judge Reck. It was later agreed among the Fenwicks and Mouden that Mouden would assign his interest in the contract to the Fenwicks which he did; this occasioned the drawing of a new trust deed and trust deed notes which was done and they were executed by the Fenwicks and left in the care and custody of Judge Reck. Judge Reck likewise was employed to examine the title to the land, by the Fenwicks.

In the latter part of the year 1919, or early in 1930, it appears that appellee and her husband, Paul Fenwick, and Mouden, met at the office of an attorney in Rockford, by the name of Reynolds; Reynolds called in an attorney by the name of Hull. Hull went to the office of Reynolds and met the Kirks, Fenwick and Mouden; Reynolds informed Hull that appellant had sold the Kirk farm to the Fenwicks, and that he claimed a very large commission and that he, Reynolds, wanted to look into it for the Kirks and Fenwicks; Reynolds was desirous of getting possession of the trust deed and trust deed notes that had been executed by the Fenwicks; Hull, at the suggest-

day that applicant and her husband arrived in the  
of said, applicant was employed as a clerk for \$200.00 per  
month on his compensation for the making of the sale of  
the land. It appears that some time subsequent to the  
execution of the contract of sale, Jonathan Vint, was  
back of applicant, requested applicant to have all papers  
ready by March 1st, 1925; applicant communicated with  
the Tegelers and Tegelers employed one George Beck to  
draw the same back and the same back was so drawn  
and in the manner of sale and the same was drawn  
and the same was drawn and executed by Jonathan  
Anne Tegelers and by Henry Tegelers, and left in the custody  
of George Beck. It was later learned among the Tegelers and  
Jonathan that Jonathan could not draw the same in the same  
manner as the Tegelers which he did; the same was then  
drawn of a new tract and the same was drawn and left in  
the care and custody of George Beck. This same tract  
was employed to purchase the title to the land, by the  
Tegelers.

[illegible]

ion of Reynolds, called upon appellant and learned from him that Judge Reck had the trust deed and the trust deed notes. The trust deed and trust deed notes were delivered to Fenwick by Judge Reck under a promise that Fenwick would return them as soon as he could have his attorney in Rockford examine them. The trust deed and trust deed notes were never returned to Judge Reck as Fenwick had promised to do, but they found their way into the hands of Attorney Reynolds. Shortly after the trust deed and notes were delivered to Reynolds, Jonathan Kirk, the husband of appellee, departed this life. On March 1st, 1920, appellant asked appellee for the notes he was to receive under the contract, or for their value, and appellee replied to appellant that the Fenwicks did not intend to carry out the deal. This suit followed.

The record discloses that subsequent to March 1st, 1920, the Fenwicks went into possession of the farm. Under what circumstances, a settlement, if any, was entered into between appellee and the Fenwicks does not appear. It is quite apparent from the evidence disclosed in this record, that a labored attempt was made with the view of defeating the claim of appellant.

From ~~the~~ a consideration of all the evidence in this case we conclude that there was evidence in the record fairly tending to prove the claim of appellant that he procured a purchaser who entered into a written contract for the purchase of the farm in controversy, which was accepted and agreed to by appellee and her husband. No reason has been pointed out why the contract of sale could not have been specifically enforced by appellee if she had seen fit so to do.

On March 1st, 1930, applicant called applicant for the notes he was to receive under the contract, or for value, and applicant refused to deliver them until witness did not intend to bring suit for them. This suit followed.

The record discloses that respondent is known to have been in New York City at the time of the hearing, and that he was present at the hearing. The record also shows that respondent was present at the hearing, and that he was present at the hearing.



We are further of the opinion that there was no dissatisfaction with reference to the contract on the part of appellee or purchasers until after they had met at the office of Reynolds. From that time on there was an attempt made to avoid the contract as far as the payment of the claim of appellant was concerned. Under the law the duty of the trial court to submit the issues in this case to the jury was clear. There was evidence in the record fairly tending to support the claim of appellant, and for that reason the court improperly directed the jury to return a verdict in favor of appellee. The judgment is therefore reversed and the cause remanded.

Reversed and Remanded.

the first of the opinion that there was  
no discrimination with reference to the conduct of the  
part of appeals or promissory until after they had been  
at the office of Reynolds. From that time on there was  
an attempt made to avoid the conduct as far as the pay-  
ment of the claim of appellant was concerned. Under the  
law the duty of the trial court to submit the issues in  
this case to the jury was clear. There was evidence in  
the record fairly tending to support the claim of appel-  
lant, and for that reason the court improperly directed  
the jury to return a verdict in favor of appellee. The  
judgment is therefore reversed and the case remanded.

Reversed and Remanded.

STATE OF ILLINOIS, {  
SECOND DISTRICT. ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 6th day of  
august in the year of our Lord one thousand  
nine hundred and twenty three

*Justus L. Johnson*  
Clerk of the Appellate Court.





7132. (3/16)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April,  
in the year of our Lord one thousand nine hundred and  
twenty-three, within and for the Second District of the State  
of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

2291A. 738

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BE IT REMEMBERED, that afterwards, to-wit: On  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



CHARLES L. HOLDREN, Executor  
of the estate of Mathias C.

Holdren, deceased,

defendant in error,

vs

MRS. L. D. MORRIS

plaintiff in error,

Error to Circuit

Court of Winnebago

County.

Jett, J.

The defendant in error began suit in the circuit court of Winnebago County against the plaintiff in error to recover on a promissory note for \$800.00 with certain credits thereon. A trial by jury resulted in a verdict for the defendant in error. Motion for new trial was overruled and judgment rendered against the plaintiff in error for \$1023.00. This writ of error is prosecuted to reverse the judgment.

It appears that in June , 1909, the plaintiff in error requested of and received from her father, Mathias C. Holdren, \$750.00; and that prior to that time she had received \$50.00. Plaintiff in error told her father she wanted ~~toppy~~ the money back and insisted on doing so. The father finally told her she could do so if she wanted to. ~~The father finally told her she could do so if she wanted to.~~ She afterwards made payments amounting to \$140.00 which were received by her father. Some time thereafter the payee became mentally incapacitated, and in the year 1911 the affairs of the father were being looked after by his son, the defendant in error. A meeting was held between the parties hereto and also attended by the mother, a brother and sister of the parties. The question discussed at this meeting was the money re-

Exhibit A

Page 10

CHAS. E. HENNING, Plaintiff

vs

THE CHICAGO TRUST COMPANY, Defendant

CHAS. E. HENNING, Plaintiff

vs

THE CHICAGO TRUST COMPANY, Defendant

CHAS. E. HENNING, Plaintiff

Page 11

The defendant in this case is the Chicago Trust Company, which is a corporation organized under the laws of the State of Illinois. It is a corporation with a capital of \$1,000,000.00 and a surplus of \$250,000.00. It is a corporation which is engaged in the business of acting as a trustee for the estates of decedents and for the management of the property of minors and incompetents. It is a corporation which is engaged in the business of acting as a trustee for the estates of decedents and for the management of the property of minors and incompetents. It is a corporation which is engaged in the business of acting as a trustee for the estates of decedents and for the management of the property of minors and incompetents.

It appears that in June, 1925, the plaintiff in this case, CHAS. E. HENNING, was a resident of the City of Chicago, Illinois. He was a resident of the City of Chicago, Illinois. He was a resident of the City of Chicago, Illinois.

On or about June 1, 1925, the plaintiff in this case, CHAS. E. HENNING, was a resident of the City of Chicago, Illinois. He was a resident of the City of Chicago, Illinois. He was a resident of the City of Chicago, Illinois.

On or about June 1, 1925, the plaintiff in this case, CHAS. E. HENNING, was a resident of the City of Chicago, Illinois. He was a resident of the City of Chicago, Illinois. He was a resident of the City of Chicago, Illinois.

On or about June 1, 1925, the plaintiff in this case, CHAS. E. HENNING, was a resident of the City of Chicago, Illinois. He was a resident of the City of Chicago, Illinois. He was a resident of the City of Chicago, Illinois.

On or about June 1, 1925, the plaintiff in this case, CHAS. E. HENNING, was a resident of the City of Chicago, Illinois. He was a resident of the City of Chicago, Illinois. He was a resident of the City of Chicago, Illinois.



ceived by the plaintiff in error from her father, the amount due, the payments made thereon, and all the facts concerning the same. The defendant in error insisted the money was a loan, should be repaid and a note given to their father. Plaintiff in error ~~she~~ contended her father had given her the money and no note was necessary. After a lengthy discussion of the matter the plaintiff in error retired to an adjoining room and in the presence of her sister executed the note in question, which was dated June 21, 1909, but was actually made in June, 1911.

Plaintiff in error insists she was coerced into making the note, that her brothers and sisters were angry because she refused to do so, that there was no consideration for the same. She testified as a witness at the trial and then stated that at the time she received the money from her father she offered to pay it back; her father said if ~~she~~ she wanted to pay it back she could. She afterwards made four payments thereon which were accepted by her father. It is claimed the evidence is not sufficient to justify the verdict and that there was no consideration for the note sued on. In view of the direct and positive evidence in the record and the admissions of the plaintiff in error against her interest we are of the opinion the jury was justified in returning the verdict. The contention of want of consideration for the note is without merit.

Complaint is made of the eighth and ninth instructions. The objection to the ninth instruction is that it singles out facts and makes them prominent. The instruction does refer to certain facts in the case, but it also tells the jury to consider those facts together with all the facts and circumstances shown by the evidence. An instruction is not subject to the objection that it singles out facts and gives them prominence where it

owned by the plaintiff in error from her father, the amount due, the payment made thereon, and all the facts concerning the same. The defendant in error insisted the money was a loan, should be repaid and a note given to that effect. Plaintiff in error on the contrary insisted that given her the money and no note was necessary. After a lengthy discussion of the matter the plaintiff in error retired to an adjoining room and in the presence of her sister presented the note in question, which was later shown to the jury.

Plaintiff in error insists she was coerced into making the note, that her protests and sister were angry because she refused to do so, that there was no consideration for the same. She testified as a witness in the trial and then stated that at the time she received the money from her father and sister to pay it back; her father said it happened and wanted to pay it back the same. She afterwards made four payments thereon which were acknowledged by her father. It is admitted the evidence is not sufficient to justify the verdict and that there was no consideration for the note made to her. In view of the direct and positive evidence in the record and the admission of the plaintiff in error against her interest as one of the parties the jury was justified in reaching the verdict. The contention of want of consideration for the note is without merit.

Defendant in error of the right and wrong in question. The objection to the first instruction is that it suggests one fact and makes one conclusion. The instruction does not say or suggest facts in the case, but it also tells the jury to consider those facts together with all the facts and circumstances shown by the evidence. An instruction is not subject to the objection that it states one fact and gives two conclusions therefrom.

Ag. 63 cont'd.

distinctly directs consideration of those facts together with all the facts and circumstances shown by the evidence. *Shewbridge vs Chicago Street Ry. Co.* 186 Ill. App. 454/

The objection to the eighth instruction is that it is misleading in that it assumes the note was given by the plaintiff in error to her father. We have examined the instruction and do not believe it is subject to this criticism.

Plaintiff in error complains of the refusal of the court to instruct the jury, at her request, that they might consider circumstantial evidence in arriving at a verdict. There was nothing in the evidence upon which to base this instruction.

We conclude, therefore, that the judgment of the court below should be ~~aff~~ and is affirmed.

Affirmed.





STATE OF ILLINOIS, }  
SECOND DISTRICT. }

ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 26th day of  
June in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.



7137 (31178)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April,  
in the year of our Lord one thousand nine hundred and  
twenty-three, within and for the Second District of the State  
of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

229 I.A. 658

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BE IT REMEMBERED, that afterwards, to-wit: On  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:

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A FORM OF THE ...

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Rockford and Interurban  
Ry. Co., a corporation,

Appellee

vs

G. N. Safford and G. N.  
Safford, doing business  
as G. N. Safford and  
Company,

Appellant.

Jett, J.

Rockford and Interurban Railway Company, appellee, instituted this suit in the Circuit Court of Winnebago County, against G. N. Safford and G. N. Safford doing business as G. N. Safford and Company, appellant, to recover damages for an injury done to an interurban car of appellee.

In its declaration appellee charged that the appellant by its servant so carelessly and improperly drove and managed a motor truck that by and through the negligence and improper conduct of the appellant by its servant the said motor truck was driven in and upon the track and road-bed of appellee in front of an interurban car at a time and in such a manner so as to cause the said motor truck to be struck and collided with by the interurban car of appellee, and that by reason of said motor truck having been driven upon the track and road-bed of appellee and in front of said interurban car and having been collided with it, said interurban car was derailed and greatly damaged. To this declaration appellant pleaded the general issue. A trial was had by a jury and the jury found appellant guilty of negligence and assessed the damages of appellee at \$1368.00. A motion for a new trial was, by the court denied, and judgment rendered on the verdict of the jury for the amount of damages so found.

Received and 1st of January,  
N.Y. Co., a corporation,

Witness

vs

A. A. Ballou and G. E.  
Ballou, doing business  
as G. E. Ballou and  
Company,

Defendants.

1891, 5.

Rockland and Intermountain Railway Company, Plaintiff,

instigated this suit in the District Court of New York County,

against G. E. Ballou and G. E. Ballou, doing business as

G. E. Ballou and Company, a firm, to recover damages for

an injury done to an instrument out of possession.

In the indictment there was charged that the de-

fendant by the plaintiff on or about the 1st of January, 1891,

carried a motor truck and through the negligence

and improper conduct of the defendant by the plaintiff the

said motor truck was driven in and upon the track and road

and of plaintiff in front of an instrument out of possession

in such a manner as to cause the said motor truck to be

driven and collided with the instrument out of possession,

and thus by reason of said motor truck having been driven

upon the track and road of plaintiff and in front of said

instrument out of possession being driven upon it, said in-

strument was damaged and thereby destroyed. To this charge

the defendant pleaded the general issue. A trial was had

by a jury and the jury found against the plaintiff and in

favor of the defendant and awarded to the defendant a verdict

for the sum of \$100.00, and judgment.

That a copy of the verdict of the jury for the sum of \$100.00

is found.

Ag. 37 cont'd.

It appears that the appellant was engaged in the fuel and retail lumber business in the City of Rockford on the 3rd day of October, 1919, and on the morning of said day appellant had in his service a Ford truck rated as a ton truck which was loaded with lumber, and was in charge of and driven by one Frank Snell. There is a highway out from the City of Rockford known as the North Second Street and is a part of the road extending between City of Rockford and Beloit, Wisconsin. The highway is paved with concrete from Rockford to Beloit. Appellee is an interurban railway company and has tracks running from Rockford North into the State of Wisconsin and the said Second Street Road as it went out from the City of Rockford paralleled the tracks of said interurban line. It further appears that it was about twenty-nine feet from the West rail of said interurban line to the East side of the pavement in the highway. The top of the rail was twenty-six and one half inches higher than the cement roadway which would make an approximate eight per cent grade for the twenty-nine feet. The interurban car of appellee was coming South on one of its regular trips from Beloit, Wisconsin and was running from thirty to forty-five miles per hour. It was the usual type of interurban car. The truck with which the car collided, was loaded with lumber and was being driven North. The interurban car was being driven by a motorman by the name of Burton who it appears had been in the employ of appellee as a motorman for two and one half years. The motorman was in his position while driving the car Southward and to the point where the injury was occasioned. The tracks of appellee and the highway run straight for a distance of a mile and one half or more at the place of the collision. The motorman saw the truck when it was about one thousand feet away, and it was traveling North. When the interurban car was some two hundred and fifty feet North of what is known as Harlem Consolidated School crossing the truck

It appears that the accident occurred on the  
road and that the car was traveling at a  
high rate of speed at the time of the  
collision. The car was traveling in the  
westbound lane and was struck by the  
truck which was traveling in the eastbound  
lane. The car was traveling at a speed of  
approximately 40 miles per hour at the  
time of the collision. The truck was  
traveling at a speed of approximately 30  
miles per hour at the time of the  
collision. The car was traveling in the  
westbound lane and was struck by the  
truck which was traveling in the eastbound  
lane. The car was traveling at a speed of  
approximately 40 miles per hour at the  
time of the collision. The truck was  
traveling at a speed of approximately 30  
miles per hour at the time of the  
collision.



Ag. 27 cont'd.

started turning to the right with the intention of crossing the track of appellee. As the truck turned off the cement road to go over the crossing the motorman reversed his car and sounded the whistle but the driver of the truck continued to move on. The motorman kept sounding the whistle. It appears that there was another crossing about one hundred feet North of the Harlem Consolidated School crossing and the whistle was sounded at that place. The testimony of the motorman is to the effect that when he saw the truck turn off of the cement road and start East the interurban car was traveling at the rate of about thirty-five or forty miles per hour. At the time of the collision which took place at the Harlem Consolidated School crossing the motorman said the speed had been reduced to about twenty miles per hour. It was stipulated that the damage done to the interurban car was \$1368.00 and the jury returned a verdict for that sum.

It is insisted by appellant that by reason of the conditions surrounding the place of injury the driver of the truck while on the concrete pavement could see North along the track of appellee only so far as a certain tree located between the concrete and appellee's right of way about five hundred eighty-five feet North of the crossing. The driver of the truck having departed this life since the collision was not present to testify. The testimony shows that this was what is known as an ever-green tree and seven and one half inches in diameter; few of the branches of the tree extended to some extent over the right of way; appellee insists that this tree did not obstruct the view from the crossing or from a point twenty-nine feet West of the crossing. Appellant testified that the tree was located two hundred and forth-eight paces from the center of the Harlem Consolidated School crossing and that by pace the witness meant three feet. The record discloses

started turning to the right in the intersection of Washington and  
the street on which the truck was stopped. As the truck started off the witness  
told him to stop the crossing. The witness reversed the car  
and contacted the witness but the driver of the truck continued  
to move on. The witness kept watching the truck until it  
appeared that there was another crossing about one hundred  
feet north of the Harbor Commission's building and  
the witness was located at that place. The testimony of  
the witness is to the effect that when he saw the truck  
turn off at the corner and that he did not see the truck  
nor was traveling at the rate of about thirty-five or forty  
miles per hour. At the time of the collision which took  
place at the Harbor Commission's building the witness  
was with the speed had been reduced to about twenty miles  
per hour. It was estimated that the truck went to the  
intersection and was about 100 feet and the witness returned a witness

It is limited by a small number of conditions surrounding the place of injury the driver of the truck while on the concrete pavement could not have been along the line of traffic only to see as a certain fact located between the concrete and asphalt's edge on way about five hundred eighty-five feet West of the crossing. The driver of the truck having observed the life signs the vehicle was not present in fact. The testimony shows that this was what is known as an over-the-hill and was not the only vehicle in the area; two of the witnesses of the case attended to some extent over the night of May; another witness that this was the only vehicle that was crossing on this a police investigation that was made of the crossing. Apparent facilities that was from was located the concrete and asphalt signs from the center of the United States Highway crossing and that by the witness named James West. The witness testimony

Ag. 27 cont'd.

that what is known as Brown's Crossing mentioned in this case is a thousand feet from the Harlem Consolidated School crossing; it appears from the testimony of appellant that while standing twenty-nine feet West of the West rail of appellee on the same side of the track as the alleged tree, objects could be seen several hundred feet on the track beyond the tree.

In the case of *Myhre vs Chicago City Railway Co.* 216 Ill.App. 128 it was said :- "Where it is incumbent upon one as an act of safety to look, he must look when and where he can act safely with reference to any danger observed, else the element of caution is wanting." In *Carden vs Chicago Railway Co.* 210 Ill. App. 155 it was held that it was negligence per se for a driver of an automobile to stop on the street car track or to go slow over the track when an on-coming car is close at hand. The driver of an automobile approaching the intersection of a street and the street car tracks which he intends to cross is bound where his view is unobstructed to make reasonable use of his senses to guard his own safety and to look for approaching cars at such a distance as will enable him to ascertain whether one is in sight, and a failure to do so is negligence. *Hack vs. Chicago and Int. Traction Co.* 310 Ill.App. 572.

From an examination of the record, we are of the opinion, that the evidence shows the driver of the interurban car was in the exercise of due care and caution for the safety of himself and the property of appellee; that the driver of the automobile truck was negligent in approaching the crossing; and the tracks of appellee; that there was nothing to prevent his seeing the interurban car and knowing of its approach. While it is earnestly urged by appellant that the ever-green tree in question obstructed the view of the driver of the truck, so that he could







Ag 27 cont'd

not see the approach of the car, the evidence discloses the fact that when he turned from the hard or cement road, to cross the tracks of appellee, the interurban car could then have been seen as far North as Brown's crossing, a thousand feet or more, and was between him and the tree, therefore the existence of the tree was not an element to be considered in the cause.

An instruction offered by appellant in reference to such alleged obstruction was refused and we think properly so because there was no evidence in the record to justify the giving of such instruction. It is insisted that there was a depression between the rails of the appellee company at the crossing in question and on account of this fact and on account of the condition of the approach to the track on the West side thereof appellee was guilty of contributing to the injury and collision. These questions were presented to the jury as a matter of defense and the finding was against appellant. The crossing in question was not within the limits of any incorporated city, town or village.

Complaint is made by appellant of certain instructions given on behalf of appellee because there is no instruction defining the term "ordinary care and caution." There is no instruction that expressly tells the jury what is meant by the words "ordinary care and caution" but instructions nine, eleven and twelve given on behalf of appellant in effect defines said words.

It is earnestly insisted that instruction three given on the part of appellee is erroneous and was calculated to mislead the jury. Said instruction is as follows:-

"The Court instructs the jury that the crossing in question, being outside the limits of any incorporated town, village or city, plaintiff's interurban car, in approaching and passing over said crossing, had the paramount

not see the approach of the car, the witness believes the fact that when he turned from the road on recent road to cross the tracks of appellant, the instruction may be that have been seen as the North as shown in the photograph, the second fact or more, and was between him and the truck, therefore the existence of the fact was not an element to be considered in the case.

An instruction asked by appellant in reference to such alleged objection was refused and we think properly so because there was no evidence in the record to justify the giving of such instruction. It is insisted that there was a relationship between the facts of the case and the company at the crossing in question and an account of this fact and an account of the condition of the approach to the track on the West side thereof appellant was entitled of contribution to the injury and collision. These questions were presented to the jury as a matter of fact and the finding was against appellant. The crossing in question was not within the limits of any incorporated city, town or village.

Appellant is not by appellant of certain instructions - some given on behalf of appellant because there is no instruction defining the term "ordinary care and caution." There is no instruction that expressly tells the jury what is meant by the words "ordinary care and caution," but instructions nine, eleven and twelve given on behalf of appellant in the fact define said words.

It is insisted that the instruction given to the jury on the part of appellant is erroneous and was entitled to be set aside. This instruction is as follows:-

"The Court instructs the jury that the crossing in question, being outside the limits of any incorporated town, village or city, appellant's duty was to exercise ordinary and passing care and caution, and the fact that

Ag 37 cont'd

right of way over the truck of defendant. And by that is meant that if you believe from the evidence that defendant's driver, in approaching said crossing, either saw, or by the exercise of ordinary care and caution, would have seen plaintiff's interurban car approaching said crossing, and if the jury further believe from the evidence that the conditions were such that if defendant's driver proceeded on to said crossing, a collision would occur or was likely to occur, then under such circumstances the law made it the duty of the driver of defendant's truck to stop or so slacken the speed of said truck as to permit plaintiff's interurban car to pass over said crossing ahead of the truck."

On examination it is found that the word "paramount" used in said instruction is properly defined so that the jury could not have been confused or misled by it. It is complained of this instruction that it too, failed to advise the jury of the meaning of the term "ordinary care and caution." In view of instructions nine, eleven and twelve given on part of appellant and regarding the instructions as a series we conclude the jury were fully instructed as to the law of the case. We are of the opinion that the court did not commit any error in the giving, modifying or refusing of instructions. .

Error is also assigned upon the Court's ruling upon the admission of certain evidence. We are of the opinion that these objections are not well founded.

The only substantial error that intervened during the trial of this cause was occasioned by counsel for appellee who called appellant to the stand as a witness in its behalf and asked appellant the following question: "You are the G. N. Safford doing business as G. N. Safford Company who has commenced an action for the Lumbermans' Mutual Casualty Company against the Rockford and Interurban Company have you not?" The question was objected to and







Ag. 27 cont'd.

the objection sustained. The authorities condemn any reference in this class of cases to the fact that a party to the suit may have indemnity insurance. In many cases such a reference has been held to be reversible error and in this case if it were not for the fact that the evidence clearly and conclusively establishes the right of appellee to recover we would not hesitate to reverse the judgment. It is only because we are convinced that the verdict and judgment are just that we permit them to stand. We cannot refrain however from expressing our keen disapproval of the conduct of appellee's attorney in transgressing the rules and practice so well understood by the bar of this state. The judgment of the court below is affirmed.

Affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this— 26th day of  
June in the year of our Lord one thousand  
nine hundred and twenty- three

*Justus L. Johnson*  
Clerk of the Appellate Court.





7150

131/81

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April,  
in the year of our Lord one thousand nine hundred and  
twenty-three, within and for the Second District of the State  
of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

22914658

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BE IT REMEMBERED, that afterwards, to-wit: On  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



Gen. No. 7150

Agenda No. 66

Bena Jurrres,

Appellee,

vs

William Jurrres,

Appellant

Appeal from the Circuit Court  
of Will County.

Jett, J.

Bena Jurrres, appellee, filed her bill in the Circuit Court of Will County on November 29, 1920, against William Jurrres, appellant, for separate maintenance, and obtained an injunction restraining him from selling, encumbering or otherwise desposing of his property. Appellant, on January 10th, 1921 filed his answer to the bill of complaint. At the November Term 1921, appellee, on motion and after hearing, was allowed temporary alimony and solicitors' fees in the sum of Seventy five Dollars. At the May Term 1922 the cause was heard. The case was taken under advisement, and on the 16th day of June, 1922, and during the said May Term, a decree was rendered in favor of appellee, requiring appellant to pay to appellee Thirty Dollars per month until the further order of the Court.

This appeal is prosecuted with a view of reversing the decree of the Circuit Court granting the said payments from appellant to appellee as separate maintenance and making all payments a lien on the real estate of said appellant. It appears no replication was filed to answer, and it is insisted, that since no replication was filed the complainant admits all special matters set forth in the answer to be true whether responsive to the bill or

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• *Journal of the American Medical Association*

[illegible][illegible]



Ag. 66 cont'd.

not. This is not the rule when the case has been submitted upon proofs. In such case no advantage can be taken by either party on account of the lack of a replication. Butts vs. Peoria County, 236 Ill. 370. The filing of a replication will be deemed waived. Jameson vs. Conway 5 Gil. 237; Unity Co. vs Equitable Trust Co. 304 Ill. 595. It is further contended by appellant that since no special replication was filed to the answer the matters ~~are~~ specially pleaded must be taken as true. All replications in chancery must be general. Correctly speaking there is no such a thing as a special replication in chancery, and if a replication is such, in form, it will be treated as a general replication only. Schaffer vs Weed 8 Ill. 511, White vs Morrison 11 Ill. 361.

Appellant insists the record does not disclose, either by the bill, evidence or decree, that appellee had resided within the state of Illinois for one year preceding the filing of the bill, and that such allegation and proof are jurisdictional prerequisites and cities in support thereof cases none of which are for separate maintenance. Section 2 of the statute on separate maintenance requires that such proceedings shall be instituted in the county where the husband resides, with a proviso, that if the husband move to another county in the state, the wife may proceed either in the county where she was abandoned or in the county where the husband resides at the time of the commencement of such suit. The bill does not allege where appellant resided when the proceedings were begun but the process was directed to the sheriff of the county in which the suit was brought and service was had in that county. Appellant appeared and filed his answer without questioning the sufficiency of the bill in any manner. The testimony of appellant is that he lived in Peotone, in Will County, at the time of the hearing and had lived there

not. This is not the time when the case has been submitted upon facts. In such case no advantage can be taken by either party on account of the lack of a regulation. But in *Patton County, 222 Ill. 270*, The filing of a regulation will be deemed waived. *Johnson vs. County* 2 Ill. 287; *White vs. White* 222 Ill. 270. It is further contended by appellant that since no special regulation was filed in the answer the matter was specially pleaded must be taken as true. All regulations in conformity must be generally. Correctly speaking there is no such thing as a special regulation in conformity, and if a regulation is such, in form, it will be treated as a general regulation only. *Boehmer vs. White* 2 Ill. 271, *White vs. White* 222 Ill. 270. Appellant insists the record does not disclose the filing of the bill, evidence or answer, that appellant testified within the state of Illinois for one year preceding the filing of the bill, and that such allegations and facts are jurisdictional prerequisites and rights in regard thereto cannot come in when the law requires otherwise. Section 3 of the statute on county administration requires that such proceedings shall be instituted in the county where the husband resided, with a provision that if the husband were to enter the county in the state, the wife may proceed either in the county where she was married or in the county where the husband resided at the time of the commencement of such suit. The bill does not allege with certainty that the proceedings were begun and the process was directed to the sheriff of the county in which the suit was brought and service was made on said county. Appellant appeared and filed his answer without questioning the jurisdiction of the bill in any manner. The testimony of appellant is that he lived in Patton, in Will County, at the time of the hearing and had lived there

Ag. 66 cont'd.

for twenty four years, and the decree finds that the trial court at the final hearing had jurisdiction of the subject matter and of the person of each of the litigants. It is now too late to question the jurisdiction of the court over either the subject matter or the persons to the cause when the decree finds that the court did have such jurisdiction, and when the decree is supported by the proof, although there was no positive allegation of jurisdiction in the bill.

We have disposed of all questions raised by appellant except those going to the merits of the case. Appellant insists the finding that appellee is living separate and apart from her husband without fault is not supported by the evidence, and that the sum of Thirty Dollars ordered to be paid monthly is excessive considering the income of appellant. Appellant and appellee were married October 9th, 1930, and separated after living together the short space of thirty-eight days. At the time of the hearing appellant was sixty and appellee fifty-two years of age. Both had been previously married. They had lived neighbors in Peotone, for several years prior to their marriage. Appellee had no children, her nearest relatives were brothers and sisters. Appellant had a son and daughter by his former marriage. Appellant's first wife died three or four years prior to his marriage to appellee. The testimony of all the witnesses who knew appellee, including appellant, showed she was agreeable, kind and affectionate. Appellant himself testified that appellee at no time during the period they lived together, treated him unkindly or said anything unkind to him. Appellant contends there was no trouble between them and that he was never unkind toward appellee, and that the proof did not warrant the court in finding that she was living separate and apart from him without her fault. Appellant in his



[illegible][illegible]



Ag. 66 cont'd.

answer, however, sets forth that there was a prenuptial agreement between appellant and appellee in which appellee agreed to give twenty six hundred dollars to appellant's children, after the death of appellant and appellee, and appellant testified to this fact on the hearing, and admits he and appellee had some controversy over this question and he called her a liar.

Appellee testified that as soon as they returned from their short wedding trip appellant began a course of cruel and unkind treatment towards her and quarreled with her at most all the meals, especially the dinner hour; that this caused her to feel very badly and she cried a great deal as a result of it; that when he got cross and talked loud and angrily to her she had tried to put her arms around his neck but when she did so he struck at her; that on the evening they returned from their wedding trip he told appellee he wished they had never gotten married; that this would cause his daughter to leave the house and that he would not have had that happen for a thousand dollars; that he frequently asked her how long it would take her to make up her mind to get a divorce from him, and appellee was corroborated with reference to the last statement by her niece, although appellant denied the testimony of both appellee and her niece. There is also some evidence that appellant was guilty of some misconduct during the trial, and the court remarked to counsel for appellee that he could not control him. Upon review in this court we are not required to weigh the testimony and determine where the preponderance lies, because where there is a decided conflict in the testimony, the finding of the Chancellor will not be disturbed upon appeal if the record contains sufficient evidence to sustain his finding. Johnson vs. Johnson 125 Ill. 510; Perks et al vs Perkins, et al, 158 Ill. App. 530; Smith, vs. Thomas Elevator Co. 278 Ill. 332.

and another to not appear had more opportunity over the  
testimony and he called her a liar.

Approved by the Board of Directors on 10/10/1910

Ag. 66 cont'd.

It is also insisted by appellant that the misconduct testified to by appellee did not amount to violence, and although humiliating, did not justify appellee in living separate and apart from appellant. The earlier English decisions and some of the earlier American cases recognized nothing less than actual or threatened physical violence as a ground for divorce; but in this country the prevailing modern view does not confine cruelty to a mere actual or threatened physical violence. Such injury is not considered the worst that can be inflicted on a person of refined sensibility. 9 R.C.L. 341 Sec. 131.

"Modern decisions both in England and especially in this country fully recognize that the infliction of mental suffering may constitute cruelty\*\*\*Whether in a given case there has been inflicted this grievous mental suffering is a pure question of fact to be deducted from all the ~~the~~ circumstances of each particular case, giving due consideration to the intelligence and refinement of the complaining party. 9 R.C.L. 343 Sec. 123.

The rule announced by Ruling Case Law supra is with reference to grounds for divorce. The grounds for separate maintenance are, if anything, more liberally viewed by the courts in a proceeding for separate maintenance than in a suit for divorce. In order to obtain separate maintenance, the wife need not show statutory grounds for divorce but it is sufficient if the evidence shows a persistent unjustified course of conduct on the part of the husband which necessarily renders the life of the wife miserable. Mellanson vs Mellanson 113 Ill.App. 81; Harris vs Harris 109 Ill.App. 148; Cash vs Cash 180 Ill. App. 31; and Pratt vs Pratt 197 Ill. App. 530.

It is claimed by appellant that Thirty Dollars per month is an excessive allowance for alimony to appellee and this contention is based in part on the fact that appel-



It is also stated by applicant that the wife  
 cannot testify to by applicant that she was not  
 and although husband, did not testify, applicant is not  
 ing separate and apart from applicant. The entire family  
 isolation and none of the latter American cases mentioned  
 nothing from them about a threatened physical violence as  
 a ground for divorce; but in this country the husband  
 modern view does not require a wife to remain in a  
 threatened physical violence. Such a wife is not considered  
 as the worst that can be inflicted on a person of ordinary  
 sensibility. U.S.C.A. Sec. 1431.

"Modern decisions both in England and America  
 in this country fully recognize that the infliction of non-  
 the suffering may constitute cruelty." Whether in a given  
 case there has been inflicted the physical violence men-  
 ing is a pure question of fact to be determined from all the  
 the circumstances of each particular case, giving due con-  
 sideration to the intelligence and refinement of the wife.  
 ing party. U.S.C.A. Sec. 1431.

The rule announced by Ruling Case Law is in  
 with reference to grounds for divorce. The grounds for  
 separate maintenance are, if anything, more liberally viewed  
 by the courts in a proceeding for separate maintenance than  
 in a suit for divorce. In fact it is often regarded as a  
 more, the wife need not show actual physical violence  
 but it is sufficient if the evidence shows a reasonable  
 justified course of conduct on the part of the husband  
 which reasonably tends to the life of the wife's person.  
 Williams vs. Williams 113 Ill. App. 2d; 216 Ill. App. 2d; 216  
 103 Ill. App. 2d; 216 Ill. App. 2d; 216 Ill. App. 2d; 216  
 vs. 103 Ill. App. 2d.

It is also stated by applicant that the wife  
 can testify to an excessive violence for which she is entitled  
 and this contention is based in part on the fact that



Ag. 66 cont'd.

lant is not deriving an income on a large portion of his property; that appellant had about Ten Thousand Dollars loaned out to his children, for which he receives no interest. The testimony shows that appellant possessed an estate worth about twenty thousand dollars, and he cannot take advantage of the fact that he loans about of his estate out to his children without interest in order to avoid or reduce his liability to pay alimony to his wife; if necessary a portion of his estate may be sacrificed to pay alimony to his wife. *Esergen vs Bergen* 22 Ill. 187. The rule is that a husband is bound to provide a wife with such necessities as are ~~suitable~~ suitable to her station and condition in life. *Ross vs Ross* 69 Ill. 569.

We find no reversible error in this record. The decree of the Circuit Court is affirmed.

Decree affirmed.

last is not having an income on a large portion of  
 his property; that plaintiff had about ten thousand  
 dollars loaned out to his children, for which he re-  
 ceives no interest. The testimony shows that plaintiff  
 and defendant had estate worth about twenty thousand  
 dollars, and he cannot take advantage of the fact that  
 he loans about of his capital out to his children with-  
 out interest in order to avoid or reduce his liability  
 to pay alimony to his wife; if necessary a portion of  
 his estate may be sacrificed to pay alimony to his wife.  
 Morgan vs Morgan 22 Ill. 187. The rule is that a hus-  
 band is bound to provide a wife with such necessaries  
 as are necessary suitable to her station and condition  
 in life. Best vs Best 22 Ill. 280.  
 We find no reversible error in the record.  
 The decree of the Circuit Court is affirmed.

Decree affirmed.

STATE OF ILLINOIS, {  
SECOND DISTRICT. ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 26<sup>th</sup> day of  
June in the year of our Lord one thousand  
nine hundred and twenty-three

*Justus L. Johnson*  
Clerk of the Appellate Court.





7161 (1111)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April,  
in the year of our Lord one thousand nine hundred and  
twenty-three, within and for the Second District of the State  
of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

229 L.A. 6584

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BE IT REMEMBERED, that afterwards, to-wit: On  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



Agenda No. 40.

JOHN J. LYONS,

Appellee,

VB

JOSEPH LYONS,

Appellant.

Appeal from the Circuit Court  
of Livingston County.

Jett, J.

Appellee began suit against the appellant in the Circuit Court of Livingston County, for wages claimed to be due him as a farm laborer. A trial was had and the jury to whom the issues were submitted found for appellee in the sum of \$809.00. Judgment was rendered on the verdict of the jury, from which judgment the appellant prosecutes this appeal.

The contention of appellee is that he hired to appellant as a farm laborer and overseer at the going or customary wages paid in the locality for such services, and that his employment covered a period from March 15th, 1910 to March 1st, 1919. Appellant contends that appellee worked for him prior to May 13th, 1911, putting in tiling and gathering corn, that he harvested corn by the bushel and put in tiling by the rod. After May 13th, 1911, it is insisted by appellant that appellee was to be paid fixed wages or salary.

No settlement was made until the end of appellee's services as a hired hand but when he wished money he received it in such amounts as he asked from appellant or from the brother of appellant. There is no substantial difference between the parties to this proceeding as to the sums of money appellee had received and did receive





(Ag. 40 cont'd.)

from time to time during his employment by appellant.

It appears that after several conversations between the parties about a settlement appellee on December 5th, 1919, asked appellant to figure up what was owing to him and to settle with him. On said day appellant and Stephen Lyons, a brother of appellant met appellee and they informed him that they had figured up his account and exhibited to him a paper on which they had figured his time; for the first six years, eight and one half months a year at twenty five dollars a month making \$1375.00; for 1917 appellee had been allowed forty dollars a month for eight and one half months making \$340.00, and for 1918 appellee had been allowed fifty dollars a month for eight and one half months making \$425.00, this aggregated \$2040.00; appellant had also kept an account with appellee of his work husking corn and in tiling in 1910 which amounted to \$101.52. Appellee was allowed interest on the balance due him from time to time which amounted to \$166.41, which added to the amount for services made an aggregate of \$2308.03; appellant had also kept an account of the various items of cash paid appellee which amounted to the sum of \$1830.30; this last named sum deducted from \$2308.03 left a balance of \$477.73; appellee had purchased some feed from appellant and this amounted to \$111.70 as stated by appellee himself, this last sum of \$111.70 being deducted from \$477.73 left a net balance of \$366.03 due appellee. These figures were gone over at this meeting on December 5th, and appellee received checks for the said last named sum of \$366.03, and he executed a receipt which recited that it was in full for all work to date. Subsequently without making any further claim appellee instituted this proceeding in which he claims that he worked from the year 1910 to the year 1918 inclusive on a contract of hiring by which he was to be paid the going or customary

from time to time during his employment by appellant.

It appears that after several conversations between the parties about a settlement appealed on December 28, 1919, and asked appellant to figure up what was owing to him and to settle with him. On said day appellant and Thomas Lewis, a brother of appellant, met appellant and they formed him that they had figured up his account and he desired to him a paper on which they had figured his time for the three six years, eight and one half months a year at twenty five dollars a month making \$1500.00; for 1917 appellant had been allowed forty dollars a month for eight and one half months making \$360.00, and for 1918 appellant had been allowed fifty dollars a month for eight and one half months making \$420.00, this aggregated \$1920.00; appellant had also kept an account with appellant by his work making work and in doing so in 1918 which amounted to \$101.52. Appellee was witness interest on the balance due him from time to time which amounted to \$187.41, which added to the amount for services made an aggregate of \$2308.93; appellant had also kept an account of the various items of cash paid appellee which amounted to the sum of \$1530.30; this last named sum deducted from \$2308.93 left a balance of \$778.63; appellee had purchased some food from appellee and this amounted to \$111.70 as stated by appellee himself, this last sum of \$111.70 being deducted from \$778.63 left a net balance of \$666.93 due appellee. These figures were gone over at that time by a brother of appellant and appellee received checks for the said last named sum of \$666.93, and he executed a receipt which verified that it was in full for all work he had done. Appellee without making any further claim against appellant proceeded in which he claimed that he worked from the year 1910 to the year 1919 inclusive on a contract of hiring by which he was to be paid one hundred

(Ag. 40 cont'd)

wages claiming them for eight and one half months each year except two years for which appellant claims pay for the entire year. A trial was had and the result as above indicated.

Many reasons are assigned why the judgment of the court below should be reversed. It is insisted by appellant that the court erred in admitting certain testimony over the objection of appellant and that the jury was prejudiced by the cross examination of appellant relative to his book account which was not offered in evidence, the cross examination being upon sums paid which were at no time in dispute.

It is also urged by appellant that erroneous instructions were given on the part of appellee.

Relative to the settlement appellant was corroborated by his brother Stephen Lyons. The testimony was conflicting and in our opinion fairly tended to prove the contention of appellant. This being true it was of the utmost importance that the instructions defining the law of the case should be free from error.

Complaint is made by appellant, of appellee's given instruction number three which instruction is as follows:-

"The court instructs the jury that a receipt though prima facie evidence is not conclusive evidence of payment and may be rebutted by other evidence and if the jury believe from the evidence facts and circumstances in evidence that it was not the intention of the parties by the receipt offered in evidence to foreclose the correcting of any mistakes that might occur in the settlement then in such state of the proof the jury are at liberty to disregard said receipt."

This instruction tells the jury that if they believe



were obtained from the film and was half an hour each  
your account two years or three years ago but  
the same year. A trial was held and the result of above  
followed.

Many persons are assigned by the Government of the  
country which should be reviewed. It is possible by special  
that the court should in admitting certain testimony  
over the objection of witnesses and that the jury was  
prejudiced by the exact examination of witnesses and  
to his best account which was not correct in evidence, the  
gross examination being such that it was not  
time in dispute.

It is also stated by witnesses that witnesses  
were given on the day of the trial.  
Particular of the testimony which was given  
by his brother Stephen Jones. The testimony was  
and in your opinion to be given to the jury  
tion of witnesses. This being true is one of the  
importance that the testimony should be one of the  
case should be free from error.

Complaint is made by witnesses of witnesses given  
instruction matter, that which is in the  
"The court instructed the jury that a witness  
from their evidence is not conclusive evidence of any  
most and may be rejected by other witnesses and if the jury  
believe from the evidence there was inconsistency in the  
before that it was not an instruction to the jury by  
the receipt of the evidence to instruct the jury  
ing of any witness that they come in with evidence  
that in each case of the court the jury was instructed  
to disregard all prejudice."



Ag 40 cont'd.

it was not the intention of the parties to foreclose the correcting of any mistakes that might occur, then the jury were at liberty to disregard said receipt. Merely because of the fact they did not intend to foreclose the correcting of any mistakes was not sufficient grounds upon which to instruct the jury to disregard the receipt. We hold that it was reversible error to give this instruction.

We are of the opinion that the court allowed too much latitude in the cross examination of appellant concerning his account book which was not offered in evidence, but if there was no other error than this we would not feel as though we should reverse the cause nor would we feel called upon to reverse the case merely on account of the admission in evidence of exhibits one and two offered by appellee. The giving of instruction number four on the part of appellant was calculated to mislead the jury. This instruction told the jury that under the law of this State a receipt though prima facie evidence is not conclusive evidence of payment and the same may be explained, varied or contradicted by parol evidence. While this would be a proper instruction to give where there was a dispute as to the amount of a payment made at the time the receipt was given, it had no place in this proceeding for the payment was fully shown by the two checks given to appellee and accepted by him. The payment was not questioned in any way/<sup>by</sup> either appellant or appellee. We are of the opinion that instruction number four given for appellee was calculated to confuse the jury.

We therefore, conclude, that manifest error was committed in the trial of this cause and the judgment of the court below is reversed and the case is remanded.

Reversed and remanded.

1. The first question is whether the evidence is sufficient to establish that the defendant committed the crime. The evidence is sufficient to establish that the defendant committed the crime.

2. The second question is whether the evidence is sufficient to establish that the defendant is guilty of the crime. The evidence is sufficient to establish that the defendant is guilty of the crime.

3. The third question is whether the evidence is sufficient to establish that the defendant is innocent of the crime. The evidence is sufficient to establish that the defendant is innocent of the crime.

4. The fourth question is whether the evidence is sufficient to establish that the defendant is guilty of a lesser crime. The evidence is sufficient to establish that the defendant is guilty of a lesser crime.

5. The fifth question is whether the evidence is sufficient to establish that the defendant is guilty of a more serious crime. The evidence is sufficient to establish that the defendant is guilty of a more serious crime.

6. The sixth question is whether the evidence is sufficient to establish that the defendant is guilty of a crime other than the one charged. The evidence is sufficient to establish that the defendant is guilty of a crime other than the one charged.

7. The seventh question is whether the evidence is sufficient to establish that the defendant is guilty of a crime in addition to the one charged. The evidence is sufficient to establish that the defendant is guilty of a crime in addition to the one charged.

8. The eighth question is whether the evidence is sufficient to establish that the defendant is guilty of a crime in connection with the one charged. The evidence is sufficient to establish that the defendant is guilty of a crime in connection with the one charged.

9. The ninth question is whether the evidence is sufficient to establish that the defendant is guilty of a crime in violation of a specific statute. The evidence is sufficient to establish that the defendant is guilty of a crime in violation of a specific statute.

10. The tenth question is whether the evidence is sufficient to establish that the defendant is guilty of a crime in violation of a general principle of law. The evidence is sufficient to establish that the defendant is guilty of a crime in violation of a general principle of law.

STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 76<sup>th</sup> day of  
June in the year of our Lord one thousand  
nine hundred and twenty three

*Justus L. Johnson*  
Clerk of the Appellate Court.





7731

(31208)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April,  
in the year of our Lord one thousand nine hundred and  
twenty-three, within and for the Second District of the State  
of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

229 LA-638

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BE IT REMEMBERED, that afterwards, to-wit: On  
the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



Charles E. Robinson,  
Appellee,

vs.

Appeal from Peoria

Icie Beers,  
Appellant,

Jones, J.

The appellee Charles E. Robinson recovered a judgment by default against appellant Icie Beers in an action of forcible entry and detainer before a Justice of the Peace in Peoria County. Appellant did not pray an appeal or request the Justice to fix the amount of an appeal bond as provided by Sections "18" and "19" of the Forcible Entry and Detainer Act. The amount of the appeal bond was not fixed by the Justice. Instead of complying with the Statute in reference to appeals in actions of forcible entry and detainer, appellant filed an appeal bond with the Clerk of the Circuit Court in the sum of Five Hundred (\$500) Dollars. A supersedeas was issued and served on the Justice of the Peace.

Appellee, limiting his appearance in the circuit court for the purpose of the motion, moved the court to dismiss the appeal. The motion was allowed and the appeal dismissed. Appellant now prosecutes an appeal to this court.

The law in this case is well settled and it will serve no useful purpose to restate it. The appeal to the Circuit Court was not perfected in the manner provided by Statute and the Circuit Court properly dismissed the appeal. (Fairbanks v. Streeter, 143 Ill. 226; Voorhees v. Schrieber, 183 Ill. App. 626; Bowlby v. Robinson, 45 Ill. App. 531; and Drewitz v. Sault, decided at the October term A.D. 1922 of this court but not yet reported).

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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STATE OF ILLINOIS, } ss.  
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this — 26th — day of  
June in the year of our Lord one thousand  
nine hundred and twenty — three

*Justus L. Johnson*  
Clerk of the Appellate Court.



*R. H. denied July 17, 1923*

*7118*

*(31214)*

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April,  
in the year of our Lord one thousand nine hundred and  
twenty-three, within and for the Second District of the State  
of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

*the* the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





The People of the State of  
Illinois,  
Defendant in error,

vs.

Clayton E. Trump,  
Plaintiff in error,

Error to the Circuit Court  
of Whiteside County

✓ Per Curiam.

The plaintiff in error, Clayton E. Trump, was convicted in the circuit court of Whiteside county under an indictment consisting of two counts, and to review the judgment entered upon the verdict a writ of error has been prosecuted from this court.

The evidence shows that the plaintiff in error, under the name of the Superior Motor Car Company, had been in the retail automobile business in the city of Sterling for about four years prior to November 1, 1920. He had borrowed money at various times from the First National Bank of Sterling, Illinois, and had given his note to the bank secured by a bill of sale covering certain automobiles. In April, 1920, he was indebted to the bank in the sum of \$6700.00, and on November 1, 1920, he went to the cashier of the bank, W. J. Gallagher, and stated that the automobile business was not good and he needed a loan of \$7200.00 to tide him through the winter. Gallagher, later in the day, told the plaintiff in error the bank would let him have the money on a note secured by a chattel mortgage on six automobiles described on a slip of paper which the plaintiff in error had furnished to Gallagher. This slip of paper contained the numbers and kinds of the automobiles to be covered by the chattel mortgage. A chattel mortgage was prepared covering these six machines. On November 4, 1920, the mortgage was signed and acknowledged, and the transaction was closed the next day. At that time the plaintiff in error was indebted to the bank in the sum of \$5393.46, represented by a note. The old note was surrendered, and the bank paid \$1.44 for revenue stamps on the new note. The total



amount due on the old note was \$5491.28, which amount being deducted from the \$7300.00 left a balance of \$1708.72, which was credited to the account of the Superior Motor Car Company. Of the six cars which were covered by the chattel mortgage, one was a six cylinder Oldsmobile touring car, No. 33439, which the plaintiff in error had sold on August 5, 1930, to Earl M. Sweeney. This car was subsequently levied upon by the sheriff under an execution belonging to a third party but the car was replevined from the sheriff by the plaintiff in error and at the time the chattel mortgage was executed, was in the sales room of the plaintiff in error. The replevin suit was subsequently decided against the plaintiff in error, it being held that he was not the owner of the car. Another car, an Oldsmobile truck, No. 9660, had been sold on October 27, 1930, to William H. Wyman, and on the day the mortgage was executed, it was on the floor of the store room of the plaintiff in error for some slight repairs, but did not belong to the plaintiff in error. The plaintiff in error verbally stated to Gallagher that he was the owner of all of these six cars, and the chattel mortgage which he gave contained a like representation. Shortly prior to April 1, 1931, when the note became due, Gallagher called plaintiff in error's attention to the fact that the note would soon become due and plaintiff in error said he would be prepared to meet the note at that time. About April 1, 1931, Gallagher went to plaintiff in error's place of business and found that plaintiff in error and all the automobiles covered by the chattel mortgage had disappeared. The chattel mortgage was placed in the hands of a constable for foreclosure but none of the cars could be located. Plaintiff in error had drawn from the bank all the money deposited to his account except \$51.45, which was credited on the note and was all the bank realized. The plaintiff in error was first indicted for the confidence game, was arrested in New York, brought back for trial but was acquitted. He was subsequently indicted for obtaining money



[illegible]



by false pretenses, was tried, convicted, and has brought his case to this court for review.

It seems to be conceded that the indictment is under Section 96 of the Criminal Code, (Cahill's Statutes, p. 1209, Sec. 222), but plaintiff in error insists that it should have been under Section 97 of the Criminal Code. Section 96 provides that whoever, with intent to cheat or defraud another designedly by any color of false token, or writing, or by any false pretenses, obtains from any person any money, personal property, or other valuable thing, shall be fined, etc. The first count of the indictment charges that the plaintiff in error did, with intent to cheat and defraud the bank, feloniously and unlawfully, knowingly and designedly, pretend that he was the owner of two certain motor vehicles, by which false pretenses he did obtain the money and credit from said bank, whereas in truth and in fact he was not owner of the two automobiles described in the chattel mortgage. The second count is substantially the same as the first, except that it alleges that the plaintiff in error obtained the money of the bank. Under Section 96, if the plaintiff in error obtained a loan of money, personal property, or other thing of value, he was properly charged in the indictment. He did obtain credit from the bank, which was a thing of value and which was properly alleged under Section 96. We do not think it was necessary to make the allegation under Section 97 which relates to credit, and requires a written statement before the representation is criminal.

Plaintiff in error urges as ground of reversal, that he offered evidence tending to show that the Superior Motor Car Company consisted of the plaintiff in error and Elmer E. Hess and was, in fact, a partnership; that there was no evidence of Hess' financial standing, and if the court had admitted this evidence it would have shown that the bank was not defrauded for the reason that Hess had money enough to pay the amount due on the mortgage.

for the purpose, was first, considered, and was found to be

that it is not the matter.

It seems to be suggested that the defendant is being treated

as an innocent person, and that the defendant is being treated

as a person who is not guilty of the crime.

Section 27 of the Criminal Code provides that a person who

is found to be guilty of the crime shall be liable to be

sentenced to imprisonment, or to a fine, or to both.

The defendant is not guilty of the crime, and is not liable

to be sentenced to imprisonment, or to a fine, or to both.

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to be sentenced to imprisonment, or to a fine, or to both.

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The chattel mortgage given was in the name of "C. F. Trump, doing business as the Superior Motor Car Company" and was acknowledged before a justice of the peace by "the above named C. F. Trump doing business as Superior Motor Car Company, the mortgagor therein named." The evidence shows that the entire transaction was carried on by the plaintiff in error. There is no evidence, nor is it contended, that Hess, as a partner in the business, had anything to do with the making of the loan, the giving of the chattel mortgage, or the making of any false representations with reference to the ownership of the two cars in question. It was the individual act of the plaintiff in error and he alone was responsible for it. For this reason there was no error in the refusal of the court to permit the plaintiff in error to prove a partnership, or the extent of Hess' financial responsibility.

It is next insisted that the court improperly permitted the State to prove that the plaintiff in error went under an assumed name after his departure from Sterling. The basis of this contention is that he did not go away for the purpose of avoiding arrest, or punishment, under this indictment, but that the indictment was not returned for many months after he had left the city of Sterling. The evidence shows that he was in New York and in Wyoming after he left the city of Sterling and went under the name of George A. Walker, which was the maiden name of his wife. It has been held that evidence of this character, in order to be admissible, must show that the defendant fled to avoid a criminal prosecution, or arrest, and the fact that the defendant went into another state and went under an assumed name is not competent in a case of this kind unless the element of avoiding arrest is present. The People vs. Wharfield, 261 Ill. 293. The evidence shows the plaintiff in error left Sterling shortly before the first of April when the note was due, and when it was certain that his false statements would be discovered. The question as to whether he went away for



The special verdict given was in the name of "C. F. Young, being  
business as the "Columbia Water Works Company" and was not a  
before a Justice of the Peace by "the above named C. F. Young  
being business as "Superior Water Works Company, the foregoing verdict  
was." The evidence shows that the entire transaction was  
entered on by the plaintiff in error. There is no witness, nor  
is it contended, that there, as a person in the business, was  
anything to do with the making of the loan, the giving of the  
written receipt, or the making of any false representations with  
reference to the character of the two loans in question. It was  
the individual act of the plaintiff in error and he alone was  
responsible for it. For this reason there was no error in the  
verdict of the court to award the plaintiff in error no money  
a partnership, or the estate of "John" (deceased) respectively.  
It is now insisted that the court improperly awarded a  
verdict to prove that the plaintiff in error was an insured  
man after his departure from Kentucky. The court of this court  
then is that he did not go away for the purpose of avoiding arrest,  
in Kentucky, under this indictment, but that the indictment was  
not returned for many months after he had left the State of Kentucky.  
The evidence goes that he was in New York and in Kentucky, that  
he left the city of Kentucky and went under the name of "John"  
Wilkey, which was the maiden name of his wife. It has been said  
that evidence of this character, in order to be admissible, must  
show that the defendant tried to avoid a criminal prosecution, it  
being the fact that the defendant was then residing in  
Kentucky and that he was under an arrest and he was committed to a jail of this  
State unless the element of avoiding arrest is shown. The State  
vs. "Wilkey", 100 Ill. 333. The evidence shows the contrary to  
either fact showing whether before the trial of this case the  
note was due, and that it was payable and that the defendant  
would be discovered. The question as to whether or not the



the purpose of avoiding prosecution for the crime with which he was about to be charged, was a question of fact for the jury, and we do not think there was any error in the action of the court in permitting the State to prove that, subsequent to his departure, he was going under an assumed name.

The court permitted evidence to go to the jury to the effect that the other four cars, covered by the chattel mortgage, were disposed of, or spirited away, by the plaintiff in error prior to April 1, 1921. We think the court should not have permitted this testimony to have been presented to the jury. It is not claimed that it was a part of any scheme or design, of the plaintiff in error to sell or dispose of the four cars which he actually owned at the time he gave the mortgage and to keep the proceeds without applying them upon his indebtedness to the bank. The false representations charged against him in the indictment were that the plaintiff in error claimed to be the owner of two cars which did not belong to him. It is not claimed there was any other false representation, consequently it made no difference what became of the other four cars which he owned. The plaintiff in error was not being tried for selling mortgaged property, and while, under some circumstances, it might be proper to show what became of the other four cars covered by the chattel mortgage, such was not the case here. The evidence should not have been admitted not only for the reasons above mentioned, but also for the reason that a custom prevailed in the prior transactions between the plaintiff in error and the bank, whereby the plaintiff in error was permitted by the bank to sell and dispose of the cars he had in stock which he had conveyed to the bank by bill of sale, and it cannot be doubted in this case that the bank, not only knew that he would sell all of these six cars which he mortgaged without first obtaining the express permission of the bank so to do, but that the bank expected him to do so. The natural effect of permitting the testimony with reference to the disposition of the four cars to go to the jury,

1. The first step in the process of identifying a problem is to determine the nature of the problem. This involves a thorough understanding of the situation and the factors that are contributing to the problem. Once the nature of the problem is understood, the next step is to identify the causes of the problem. This involves a detailed analysis of the situation and the factors that are contributing to the problem. Once the causes of the problem are identified, the next step is to develop a plan of action. This involves determining the steps that need to be taken to solve the problem and the resources that will be required to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan of action. Finally, the last step in the process is to evaluate the results of the plan. This involves determining whether the plan has been successful in solving the problem and whether any further action is required.

The court certified questions to the jury on the issue of whether the defendant was guilty of the crime charged. The jury returned a verdict of guilty. The court then sentenced the defendant to the state prison for a term of years.

was to prejudice the plaintiff in error in the minds of the jury.

The gist of the offense in the indictment, under Section 96 of the Criminal Code, was the obtaining of money or other thing of value with intent to cheat and defraud by means of false representations. The obtaining of money by misrepresentations is not an offense under Section 96 unless it is coupled with an intent to cheat and defraud. Whether or not such intent was present in this case was of vital importance to this prosecution. The evidence upon that question was conflicting to say the least. There is ~~xxx~~ no question, under the proof, but what the plaintiff in error did misrepresent the ownership of two of these automobiles. There is no doubt that the bank lost money by the transaction, but whether or not the plaintiff in error had in mind, at the time he procured the money, that he would cheat and defraud the bank, was a question which should have been determined by the jury under proper instruction. Unless the jury found such intent to be present at the time the chattel mortgage was made, it could not properly return a verdict of guilty. Under these conditions the court gave to the jury the sixth instruction which told them that if they believed, beyond a reasonable doubt from the evidence, that the plaintiff in error made the false representation charged with intent thereby to obtain the money of the bank, it was immaterial if he then intended to, at some future time, pay the bank the amount of money so obtained. It is clear that if at the time the plaintiff in error made this representation, he intended to pay the money to the bank at some future time, he did not intend to cheat and defraud the bank, as alleged in the indictment. It is inconceivable that the jury could return a verdict against the plaintiff in error if it believed that the plaintiff in error had no intention to cheat and defraud, but on the contrary that his intention was good, and that he honestly meant to pay back the money which he had borrowed. *People vs. Perlmutter*, 306 Ill. 405. The sixth instruction was not only erroneous, but it was highly prejudicial to the plaintiff in error.



was a purchase was admitted in view of the fact that the  
the fact of the purchase is the subject, which is the  
of the Criminal Code, and the obtaining of money on credit  
and using with intent to cheat and defraud by means of false  
statements. The obtaining of money by misrepresentation is  
and an offense under Section 36 unless it is shown that an  
to obtain and retain. Whether or not such intent was present in  
this case has of vital importance to the prosecution. The evidence  
upon this question was conflicting to say the least. There is  
no question, under the facts, that the defendant is guilty of  
obtaining the ownership of two of these automobiles. There is  
no doubt that the bank lost money by the transaction, but what  
is not the plaintiff in error has is what, at the time he advanced  
the money, that he would obtain and retain the money, was a question  
which should have been introduced by the party seeking recovery.  
Unless the jury found each intent to be present at the time the  
defendant advanced the money, it could not properly return a verdict of  
guilt. Under these conditions the court gave to the jury the  
instruction which said that if the defendant, beyond a reasonable  
doubt from the evidence, that the plaintiff in error was the owner  
of the automobile charged with intent to obtain the same, and  
that he was responsible for the loss incurred by the bank, then  
that, and the bank was entitled to recover. It is clear  
that it is the time the plaintiff in error made this representation,  
he intended to pay the money to the bank at the time he made it,  
and not intend to keep the money and defraud the bank, as alleged by the  
plaintiff. It is immaterial that the jury would return a ver-  
dict against the plaintiff in error if it believed that the plaintiff  
in error had no intention to cheat and defraud, but in the absence  
that his intention was good, and that he honestly meant to pay  
the money, and he had advanced. People vs. Robertson, 202 Ill. 456.  
The same instruction was not only erroneous, but it was also pre-  
judicial to the plaintiff in error.



The fourth instruction told the jury that the law presumes a man to intend the reasonable and natural consequences of any act intentionally done, and if they believe from the evidence, that plaintiff in error represented to the bank that he was the owner of the two cars in question, and that said representations were made for the purpose of procuring the money of the bank, and the said representations were false, and the plaintiff in error knew they were false, that would be evidence that he intended, by such representations, to cheat and defraud the bank. There are several objections made to this instruction but the most serious one is that it told the jury that certain facts would constitute evidence of his intention to cheat and defraud the bank. The jury were the judges of the law and the facts and it was not within the province of the court to tell the jury what weight should be given to certain particular facts, or what certain particular facts tended to prove. It was the province of the jury to determine the weight of the evidence and this instruction invades that province, and for that reason was erroneous.

The seventh instruction told the jury that it was not within the power of the bank, or any of its officers, to settle with the plaintiff in error for the alleged violation of the law, or to dismiss any criminal charge that might then be pending, or thereafter pending. We do not see any reason why this instruction was given. This was an indictment returned by the grand jury in the name of the People of the State of Illinois and it was not necessary that the jury should be instructed with reference to the matters contained in the seventh instruction.

Objections are made to other instructions given, and the refusal of the court to give certain instructions on behalf of the plaintiff in error. We have examined all of these instructions and do not think there is any substantial error in any of the rulings.

For the error indicated the judgment will be reversed and the case remanded.

Reversed and remanded.

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STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,  
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,  
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in  
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this 6th day of  
August in the year of our Lord one thousand  
nine hundred and twenty- three

*Justus L. Johnson*  
Clerk of the Appellate Court.





October Term, A. D. 1922

Loren C. Cox, Appellee

vs.

John F. Garner, Appellant

Appeal from Adams.

NIEHAUS, P. J.

This suit was brought by Loren C. Cox, the appellee, against the appellant John F. Garner, to recover a commission alleged to be due the appellee as real estate broker for bringing about a sale of certain real estate which was owned by the appellant. There was a trial of the case in the circuit court of Adams county on appeal from a justice of the peace. The trial resulted in a verdict finding for the appellee, fixing his damages at \$210; afterwards the court, on motion of the appellee, allowed a remittitur of \$19.58 to be entered, and thereupon rendered judgment for the sum of \$190.42; from this judgment an appeal is now prosecuted.

The evidence shows, that the property of the appellant Garner, which he was desirous of selling, was a dwelling house and lot, in the city of Quincy; and the purchase price was \$7000.00. Appellee Cox by telephone made an arrangement with him, by which he was authorized to sell the property for appellant; and if he sold it for appellant at the price stated, the appellee was to receive three per cent commission on the purchase price for his services. The appellee induced Roy A. Coffman to look at the property with a view to buying it, and got him interested in the matter of its purchase. The inference which may be properly drawn from the evidence in the matter of its sale is, that the appellee's efforts were the procuring cause of the sale to Coffman, although the final negotiations for the sale were carried on by the appellant; and it was agreed between the appellant and Coffman that the purchase price was to be \$7000.00, but that appellant take \$2000.00 in liberty bonds as

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part of  
the purchase money, at par value; the actual value of these bonds at the time, was \$260.94 less than par; it



was also agreed between them, that Coffman should assume the payment of special assessments amounting to \$391.47, which were a lien on the property; and this should be deducted from the purchase money; which made the net amount of money received by appellant for the property, \$6347.59.

It is contended by the appellant, that the appellee has no right of recovery because the final negotiations for the sale of his property were conducted by him; and that he consummated and effectuated the sale of the property. While this is true, it does not deprive the appellee of his commission, if the purchaser was procured by him, and the sale was brought about as the result of his efforts; the mere fact that seller consummates the sale, or that it is finally made upon different terms by the seller than those proposed to the broker does not deprive the broker of his commission. *Hafner v. Herron* 165 Ill. 242; *Rounds v. Victoria Hotel Co.* 184 Ill. App. 501; *Ogren v. Sundell* 220 Ill. App. 584. The evidence in this case is clearly to the effect, that through the efforts of the appellee in procuring a purchaser, the appellant was enabled to sell his property; and that therefore appellee was entitled to the commission agreed upon.

It is also contended by the appellant, that the court was without jurisdiction to allow the remittitur to be made, and in reducing the amount of the verdict, from three per cent of the amount of the purchase price, to three per cent on the amount actually received as purchase price for the property. It is well settled however, that where there is a right of recovery for an amount certain, and the amount in the verdict exceeds such a sum, it is proper to cure the error in the verdict by allowing a remittitur to be entered; *Taylor v. Craig* 205 Ill. App. 233. Moreover the appellant in this case was not injured by the reduction of the amount fixed by the verdict of the jury, and is therefore not in position to complain. *Richardson v.*

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Lusk 208 Ill. App. 333.

For the reasons stated the judgment is affirmed.

Judgment affirmed.

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October Term, A. D. 1922

Frank Coventry, Appellee.

vs.

Herman Bunning, William Bunning, Appellants.

Appeal from Shelby

NIEHAUS, P. J.

In this case a judgment was taken on February 25, 1922, by the appellee Frank Coventry in the circuit court of Shelby county, against the appellant Herman Bunning and William Bunning, on a judgment note with warrant of attorney attached, for the sum of \$3561.86. The amount of the judgment includes \$323.80 attorney's fees, which was ten percent of the amount of the unpaid principal of the note, and accrued interest. The note by its terms did not become due until March 1st, 1922; but the warrant of attorney gave any attorney of any court of record authority to appear for the appellants in such court in term time or vacation, at any time after the date of the note, and confess a judgment, without process, in favor of the holder of the note, for such amount as might appear to be unpaid thereon, together with costs, and ten percent of the unpaid amount, as attorney's fees. The appellants appeared in court after the judgment had been entered, and made a motion to open up the judgment; and for leave to plead in defense of the allowance of the \$323.80 attorney's fees; which motion they supported by the affidavits. The motion to open up the judgment was denied; and this appeal is prosecuted from the order denying the leave to appellants to plead in defense.

We are of opinion, that the motion was properly denied; the affidavits do not set up any matter which can be regarded as a legal defense to the amount allowed as attorney's fees. It is asserted in the affidavits, that ten percent attorney's fees referred to in the warrant, is

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unjust excessive unreasonable, and contrary to law; these averments are merely the assertions or conclusions of the affiants. Inasmuch as the appellants by express



contract agreed to the allowance of ten percent attorney's fees, they are not in position to assert that they are excessive, or unreasonable. The fact that the appellee may have been actuated by improper motives or ill will in entering up the judgment before the maturity of the debt, could not be pleaded in defense. *Martin v. Summers* 79 Ill. App. 392. The judgment is affirmed.





October Term, A. D. 1922

R. L. Hartwig, Appellant

vs.

Adelia M. Stickel, Appellee

Appeal from County Court Logan County.

NIEHAUS, P. J.

This is an appeal from a judgment of the county court of Logan County, in a suit brought by the appellant R. L. Hartwig against Adelia M. Stickel the appellee, to recover for the keep of a horse, from October 17, 1908 until September 1920 when the horse died. The horse by special bequest in the last will and testament of Simon Niebuhr deceased, appellee's father, had been left to the appellee. It is claimed by appellant that the appellee at the time of the testator's funeral, made a contract with him through the agency of his father, Paul Hartwig, to keep the horse for her; and that upon the strength of this arrangement he kept the horse for the appellee; and was therefore entitled to recover the sum of \$180.00. Paul Hartwig the father testified concerning the conversation he had with appellee about taking care of the horse, that on the day of the funeral in the home of the deceased testator Simon Niebuhr, the appellee asked him if Lawrence would take care of the horse for her; and that he told her "yes, Lawrence would take care of it;" that thereafter he told his son the appellant what the appellee had said to him; and the appellant thereupon took the horse to his farm five miles north of Lincoln. The appellee's version of the conversation she had with Paul Hartwig is quite different. She testified, that she told him she was to have the horse; and that if Alex (the executor) gave her the horse, could she have him out at Lawrence's? To that Hartwig replied, he didn't know. whereupon she said, "just a month until I get back?" And then Hartwig said "I guess so." The appellee is corroborated in her

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version of the conversation which took place between her and Paul Hartwig, by the testimony of her sister Mrs. A. E. Ahrens.



The proof in the case shows that the executor of the estate in whom control of the horse was legally vested, did not consent to have the same turned over to the appellee until after the lapse of about a year after the conversation referred to; and that then, after the appellee had obtained the executor's consent, to take possession of the horse, she applied to the appellant for the horse through the instrumentality of Fred Allen; but appellant refused to deliver possession of the horse to her, until she paid a bill which he claimed she owed him for the keep of the horse up to that time, amounting to the sum of \$106.50; the appellee refused to do so, and appellant then retained the horse until the horse died. The court found the issues for the appellee. Appellee could not be held liable for the keep of the horse while the same was under the legal control of the executor, unless she made an express contract to pay for the same. The finding of the court that no contract was made is sustained by the weight of the evidence; and under these circumstances this court would not be justified in disturbing the judgment. The judgment is affirmed.





General No. 7491

Agenda No. 8

October Term, A. D. 1922

Laurent Breault, Defendant in Error

vs.

H. W. Brownfield and Maud Brownfield,

Plaintiffs in Error

Error to McLean.

HEARD, J.

On July 8, 1921, Defendant in error, hereinafter called Plaintiff, obtained judgment by confession against plaintiffs in error, and Gordon Wyckoff who was the principal in the judgment note. A motion supported by affidavits was filed July 16, 1921, in behalf of the defendants in the judgment to open the judgment for the purpose of allowing defendants to plead. The court certified there was probable cause for staying execution and proceedings thereunder and the motion was set for hearing at the September Term. The motion on leave to plead was not argued until the April Term, 1922.

On June 22, 1922, plaintiffs in error filed an amended motion to open judgment and for leave to plead and also asked leave to file an amended affidavit in support of such motion, which was presented in open court to the trial judge. The court heard the motion but overruled it on the ground that the amended motion was not presented until after the court had advised counsel that their original affidavit was wholly insufficient.

The court then overruled the original motion to open judgment and for leave to plead. The original affidavits filed with the original motion were made by H. W. Brownfield and Maud L. Brownfield. The affidavits set out that the note on which said judgment was taken by confession was given to the plaintiff for part of the rent for 100 acres of land located about six miles northeast of Kankakee in Kankakee County, Illinois, for the term beginning March 1, 1920, and ending March 1, 1921; that in negotiating for the lease of said land, plaintiffs in error had a conversation with the plaintiff about renting the land in question; that H. W. Brownfield told the plaintiff he wanted the land for his nephew, one of his co-defendants; that plaintiff stated that he wanted \$1700.00 cash rent for the land, \$500.00 to be paid in advance and the



balance on or before February 1st, 1921, to be evidenced by promissory notes; that he

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wanted plaintiffs in error to sign said notes if he rented the land to the said Gordon Wyckoff; that Brownfield told him that he did not want his nephew to rent the land if he could not make the rent off of it and the plaintiff answered that the land was rich and fertile land and very productive; that it was one of the best farms in that neighborhood and never produced less than 60 bushels of grain per acre. that plaintiffs in error never farmed land in Kankakee county and had lived in Kankakee only about a year and were not acquainted with said land and did not know what kind of land it was for producing crops but relied on the representations made by the plaintiff and believing that the same were true, signed notes for \$1700.00, one of which was the said \$1200 note, and the other a note for \$500 due February 1, 1920; that about 50 acres of the land was sown in oats the prior year and was in stubble ground at the time the lease was negotiated and a man with a tractor was hired and plowed the land that fall for corn and the next spring 10 acres more was plowed for corn, making 60 acres for corn, which was planted early as the season permitted and well cultivated, but that about 40 acres of the corn was wholly a failure on account of the soil being thin, poor, worn out soil from raising crops without rotation or being fertilized, and on the entire 60 acres only 900 bushels of corn was produced, which practically was raised on 20 acres of the better land; that 20 acres of the land was sown in oats and yielded about 500 bushels, being not more than one-half of a fair average crop; that there were 15 acres in pasture, about one-half of which produced no grass; that off of the 5 acres of timothy meadow there was only 3 small loads of hay; that said land was not one of the best farms in that neighborhood, but in fact, it was one of the poorest, that the land was not rich and fertile, but was mostly very poor worn out land which would not produce crops of any kind and that in prior years very poor crops were raised on the land, and far below an average yield, and much less than 60 bushels per acre; that the representations made by the plaintiff were false and fraudulent.





lent, and that the plaintiff knew at the time that the same were not true; that all of the corn raised on said land during the term was turned over to the plaintiff who estimated the amount to be 900 bushels and agreed to take the corn at 50 cents per bushel, making \$450.00, which he said he would credit on the rent and this affiant paid the plaintiff \$500.00 in cash, making a total of rent paid to the plaintiff \$950.00, which was far in excess of the rental value

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of said land; that the plaintiff got all of the crops raised on said land or equivalent in money and the tenant did not do well or make any money; that the plaintiff had allowed a credit on the rent of \$328.00, when he should have allowed a credit of \$450.00.

The amended affidavit for which leave to file was asked on June 26, 1922, stated the facts and circumstances of the case, more fully showing the alleged fraud and showing that the said plaintiffs in error were mere sureties for the defendant Wyckoff; that Wyckoff had absconded and was insolvent; that the representations made by the plaintiff to the plaintiffs in error with reference to the character of the soil and the fertility and productiveness thereof were made by the plaintiff with the intention of deceiving and defrauding the plaintiffs in error and they were deceived and defrauded thereby; that neither of them would have signed the notes as surety for the said Gordon Wyckoff had it not been for the false and fraudulent representations made by the Plaintiffs to them.

It is urged by plaintiffs in error that the court erred in not allowing them to file their amended affidavits. Sec. 1, Chap. 7, Rev. Stats. Ill. provides that the court in which an action is pending shall have power to permit amendments in any process, pleading or proceeding in such action either in form or substance, for the furtherance of justice, and on such terms as shall be just, at any time before judgment rendered therein. We think it is apparent from an examination of the affidavits that the defense sought to be set up by the amended affidavits was the same as that attempted to be set up by the original affidavits, the main difference being the fact set up in the additional affidavit that plaintiffs in error signed



the note as surety for Wyckoff.

The facts set up in the amended affidavits, if true, constituted a good defense on the part of Plaintiffs in error to the note. When any material part of the transaction between the creditor and the debtor is misrepresented by the creditor to the surety and, but for such misrepresentations the suretyship would not have been entered into, or if entered into the extent of the surety liability increased the surety so given is void at law on the grounds of fraud. *Booth vs. Storrs*, 75 Ill. 438; *Stone vs. Compton* 5 Bing. N. C. 142.

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While the allowance of amendments is a matter of discretion with the court somewhat it is not an arbitrary discretion but the court in the exercise of the discretion vested in it by the statute should allow such amendments to be made to enable the defendant to present the merits of his defense to the action as will be just and reasonable for the protection of the rights of all parties concerned. *Kirkpatrick v. Cooper* 77 Ill. 565; *Delfose v. Kendall* 283 Ill. 301.

While a person who has been induced to enter into a contract by fraud must as soon as he learns the truth, with all reasonable diligence, disaffirm the contract if he desires to apply to a court of chancery for a rescission and, if, after discovering the untruth of the representation, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations by way of rescission in a court of equity, yet the party defrauded can, without appealing to a court of chancery when sued upon the contract claim his damages by way of recoupment. Both the original and the amended affidavits therefore set up a **prima facie** defense to at least a part of plaintiff's claim.

On the hearing of a motion to open up a judgment by confession the merits of the defense are not in issue but the affidavits filed in support of the motion are to be taken as true and if they set forth a **prima facie** defense, they are, in that respect, sufficient. *Mendell v. Kimbell* 85, Ill. 582. *Gilchrist Transportation Co. v. Northern Grain Co.* 204 Ill. 510; *Continental Can Co. v. Henderson Co. Public Service Co.* Ill. App. (3d Dist. 7433.)





The Court erred in denying the motion of Plaintiffs in error to open the judgment to allow plaintiffs in error to plead to the merits.

The order of the circuit court is reversed and the cause remanded with direction to the circuit court to open the judgment for the purpose of allowing plaintiffs in error to plead to the merits the judgment to stand as security.



General No. 7494

Agenda No. 11

October Term, A. D. 1922

Asahel Phillips, et al, Appellees

vs.

Earl Walters, Administrator of the Estate of Emma  
Burtis, deceased, Appellant

Appeal from Fulton.

HEARD, J.

This is a proceeding commenced in the county court of Fulton County by appellees against appellant and others by petition for a citation to account for certain chattels claimed to belong to the estate of deceased.

Later an amended petition was filed wherein appellant was the only party defendant. The amended petition set up the death of Emma Burtis and the appointment of appellant as administrator of her estate. It then alleges that appellant afterwards filed a pretended inventory in said estate and that said inventory is not complete and does not contain all the property of the said deceased. That the said deceased at her death was possessed and the owner of household goods, cooking utensils, furniture, wearing apparel, a diamond ring, gold watch, canned fruit and vegetables, sixty dollars in currency and silverware, all of which were omitted from the inventory of the said administrator. The petition then asks that appellant be required to inventory said property and take necessary legal action to reduce it to possession.

A hearing was had on this amended petition in the County Court which resulted in a finding in favor of appellant, and a dismissal of the petition. An appeal was taken to the Circuit Court which entered an order requiring appellant to inventory a list of chattels therein enumerated, and to bring such proceedings as may be necessary to try the title to the same.

There was no dispute that the deceased in her lifetime was the owner of certain household furniture and cooking utensils which she used in her home in the City of Lewistown, and that the same were not





accounted for by appellant.

The position of appellant is that these household effects were given by deceased to her sister, Melinda Melvin, in her lifetime, just prior to her death, and that at the time of her death they were not the property of deceased or her estate, and should not be inventoried as such.

Appellant has prayed and perfected an appeal to this Court and has assigned the following errors on the record:

1. The court admitted improper evidence on the part of appellees, and refused to admit proper evidence offered by appellant.
2. The finding and order of the trial court are contrary to the evidence and the law.
3. The court erred in ordering appellant to inventory and take possession of the various articles of property enumerated in said order.
4. The court erred in refusing to find that Emma Burtis disposed of the property in question in her lifetime.
5. The court erred in refusing to find that the property in dispute was given by the deceased to her sister, Melinda Melvin, and does not constitute a part of her estate.

From an inspection of the petition the order and the assignments of error, it is evident that even if all the errors complained of had been committed, appellant has no standing in this court to urge such matters as all such errors if committed would have been to the advantage of appellant as such administrator and it is a familiar rule of law that one cannot assign as for error that which is beneficial to him. Elliott on Appellate Pro. Sec. 526.

Moreover, the judgment or order appealed from is not a final appealable order, but simply an order directing an initiatory step, necessary to bring before the county court a cause for disposition in that court. As against the petitioner the order of the County Court denying the petition was a final appealable order, it disposing of the controversy finally unless reversed. Had the prayer of the petition been granted by the County Court it would have been only preliminary as a step in a proceeding in which a final order would subsequently be entered.



As the order or judgment of the Circuit Court was but a preliminary not a final order, an appeal does not lie therefrom in behalf of appellant and the appeal therefore must be and is dismissed. McCallister v. Greene County Bank 171 Ill. 608.

**Page 2**





October Term, A. D. 1922

Howard Vaughn, Appellee

vs.

St. Louis, Springfield and Peoria Railroad, Appellant

Appeal from Logan.

HEARD, J.

This is an action on the case, brought by Howard Vaughn, appellee, against the St. Louis, Springfield & Peoria Railroad, Appellant, to recover damages sustained to the truck of appellee in a collision between the truck of appellee, driven by his servant, Herbert Hunter, and the train of appellant on Chicago street in the City of Lincoln at about 7:30 o'clock P. M. on the 16th day of November, 1921.

The declaration contains eight counts, the first count charging appellant with carelessly and negligently operating its train of cars; the second count charges appellant with negligently operating its train of cars without giving any warning or signal of the approach of said train; the third count charges that appellant was negligent in not keeping a careful lookout and without having its motor car under control; the fourth count charges that appellant was negligent in operating its train at an excessive rate of speed, to-wit: 25 miles per hour; the fifth count charges that appellant was negligent in not having in operation a sufficient and conspicuous light on the front end of the car; the sixth count charges the violation of a speed ordinance of the City of Lincoln, which limits the speed of any passenger train or car, within the City limits to ten miles an hour; the seventh count charges violation of an ordinance of the City of Lincoln requiring trains of cars while in motion in the night time within said City, to have conspicuous bright lights shining in the direction in which the train or car is moving; each of the above seven counts charges that the

Page 1

servant of appellee was in the exercise of ordinary care for the safety of the truck at the time of the collision; the eighth count charges appellant with willful and wanton disregard of the safety of lives, limbs and property of persons who



might be travelling on Tremont street and that he drove, operated and ran certain railroad car at great and reckless rate of speed, to-wit: 25 miles per hour without giving signal or warning of the approach of the car, without having bright and conspicuous light in front of the car and without having said car under control and without maintaining a sufficient lookout to observe danger. A plea of not guilty was filed by appellant to each count of the declaration and upon trial the jury found appellant guilty and assessed appellee's damages at \$1,750.00. The Court after denying a motion for new trial gave judgment in favor of appellee upon the verdict of the jury from which judgment this appeal is taken by appellant.

It is contended by appellant that the verdict of the jury was contrary to the evidence in the case. The proof shows that Chicago street extends northeasterly and southwesterly, but for convenience will be considered as extending north and south—through the City of Lincoln, upon and along which extends the railroad track of appellant. Chicago street is intersected at right angles by Tremont street one block south of which is Delavan Street; one block south of Delavan Street is Pekin Street; one block south of Pekin street is Broadway, the main east and west street intersecting Chicago street, along which extends the City street car line and at the corner of Broadway and Chicago streets is located what is known in the record as Alvey's Drug Store, one of the stations or stopping places of appellant; about one block and a half south of Broadway street on Chicago Street is the main interurban station. The collision in question between the train of appellant and appellee's truck occurred on Chicago street immediately south of the intersection of Tremont and Chicago streets, about 1160 feet from the Alvey Drug Store at which appellant's car made its last stop before

Page 2

the collision. The blocks between Broadway and Pekin Streets, Pekin and Delavan and Delavan and Tremont streets are 320 feet in length, exclusive of streets which are 50 feet wide, making the distance from Alvey's Drug Store to Tremont street 1160 feet and the distance from Alvey's Drug Store to the Station 580 feet, making distance from the station to





Tremont street 1740 feet. Sangamon street is parallel with and immediately west of Chicago street, the length of the block between Chicago and Sangamon Streets, being the property of the Chicago and Alton Railroad Company, is 180 feet.

The Chicago and Alton Railroad tracks, two main and one siding, extend north and south, west of and parallel with Chicago street across Tremont street. The distance from the east rail of the Chicago and Alton track to the west line of Chicago street is 87 feet. Tremont street is 60 feet wide, 30 feet in the center of which is paved; Chicago street is 60 feet wide and is paved to the north line of Tremont street. The pavement on Chicago street is 27 feet wide, without the wings, at the intersection of Tremont Street, and gradually widens for a distance of 20 feet when it becomes 30 feet wide. The distance from the west rail of the interurban track to the west curb line of Chicago street is 10.4 feet and to the west line of Chicago street 26 feet. South of Tremont street and west of Chicago street is a grain elevator, the north side of which is on the south line of Tremont street and the east line of the elevator is 72 feet from the west rail of appellant's track on Chicago Street. 93½ feet south of Tremont Street, fronting east on the west line of Chicago street is a double row of corn cribs about 50 feet wide, immediately south of which cribs, on the west side of Chicago Street, and about 170 feet south of Tremont street is located the Bottling Works of appellee.

The evidence shows that appellee on the 16th day of November, 1921, the date of the collision in question, and for a

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number of years prior thereto had owned and operated a bottling works in the City of Lincoln; that on November 16th and for over a year prior thereto Herbert Hunter had been employed by appellee to drive a truck in connection with his business. The truck was of the G. M. C. type, length 19 feet 10 inches from end of body to front end of springs and weighed 5500 pounds; that Herbert Hunter went to work about 7 o'clock on the morning of November 16th, 1921, and drove the truck in question a distance of 75 or 80 miles going to Arming-



ton, Tazewell County, Stanford and Davers in McLean County and other points and that he returned to Lincoln about 7:30 in the evening; that the day had been rainy, the roads wet and the evening was damp, misty and foggy, so that one could not see well. According to the testimony of Hunter, as he was driving east on Tremont street, after returning to the City of Lincoln from his trip, he stopped his truck west of the C. & A. tracks, to allow a freight train to pass; that after the train passed he proceeded east on Tremont street until he reached the intersection of Tremont and Chicago streets, where he turned south on Chicago street driving onto the tracks of appellant and when he had completed the turn south on Chicago street, just south of the intersection, the truck he was driving collided with the northbound interurban car of appellant, the truck being struck and pushed back and turned around, the front of the truck facing Tremont Street and was backed against a pole at the southwest corner of the intersection.

The evidence shows that the interurban car with which the truck collided reached Lincoln from Springfield on its regular run about 7:30 P. M. and that a special car was attached south of Lincoln which had been chartered for the purpose of bringing to Lincoln and returning to Peoria, the Bradley football team which played Lincoln College on the day in question, together with other Bradley students. Evidence was offered by appellee as to the speed of the train at the time of the collision from eight

Page 4

of the Bradley students who were passengers on this special car or trailer at the time of the collision. These witnesses variously estimated the speed of the car from 15 to 20 miles an hour.

Evidence was offered by appellee that no signals were given from the same witnesses and others.

On the question of speed and signals, the train men, motorman and conductors on the two cars, two passengers on the front car estimate the speed at from 6 to 8 miles an hour and these witnesses and Mrs. Hopp who was walking west on Tremont street in the vicinity of the collision testify that signals were given.

The fifth count charges common law negligence in





not having a bright light and the seventh count the violation of an ordinance requiring a bright light on cars moving through the City of Lincoln in the night time and there is some evidence in the record to sustain these counts. On the contrary the train men, two passengers on the front car, several of appellee's witnesses testify that the headlight was burning before the collision and there is also evidence to show that in addition to the headlight there was also burning a green light placed on or near the top of the front car on the left hand side over the motorman's booth as a signal that a second section of the train was running on the same time of the first train. There is evidence to show that both cars were lighted with 36 incandescent globes, the light from which was shining through the windows of the cars, and could be and were seen that night for a distance of over a block away.

The third count charges that appellant did not have its motor car under control and did not keep a careful lookout. There is evidence tending to show that George Washbond, motorman operating the interurban train, who had had nine years experience as motorman and had been on the run through Lincoln from Peoria to Springfield three years, was in his booth looking ahead of his car, that he first saw the truck as it turned the corner at

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Tremont and Chicago streets and immediately applied the air brakes which were in good condition; that the train stopped within 40 feet from the place of collision or less than the distance of one car length. There is evidence to show that a train of two interurban cars under the conditions existing at the time of the collision, going at a speed of 20 miles an hour could not have been stopped in less than 260 feet, but if operated at a speed of 10 miles an hour could have been stopped within a distance of 45 or 50 feet and if operated at a speed of 6 to 8 miles an hour could have been stopped within 30 or 40 feet.

The evidence shows that the truck in question had an enclosed driver's cab with windshield in front and glass panels in doors on each side. Hunter testifies that the windshield was straight out and the window to the door to his right was up and that there was nothing to



obstruct his view to the right; that there were no vehicles of any kind on Tremont or Chicago streets or at the intersection as he approached the intersection; that the truck had no headlight but carried two oil lamps placed on each side of the cab which gave a very dim light. According to the testimony of Hunter, after the freight train passed he started the truck and while upon the C. & A. tracks shifted to second or third gear; that he drove east on Tremont street towards Chicago street. He testified that he was driving slow "because that is kind of a bad corner to make," that about half way between the C. & A. tracks and Chicago streets he looked south as far as the cribs on Chicago Street and could see no car; that he then looked north and turned his head south again when he was within ten feet of the corner and within 20 feet of the track and that he was looking for an interurban train. He then turned his truck south and when he "was on about an angle of the turn the interurban appeared "right up within about 6 or 8 feet" of him; that he did not see or hear the interurban until it was within 6 or 8 feet of him. He testified that the front of his car was struck.

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According to his testimony, when he first looked south he was going about 4 miles an hour and when he turned the corner was moving  $1\frac{1}{2}$  to 2 miles an hour and that he could have stopped his truck while moving at the rate of 2 miles an hour within about 8 feet.

There is also testimony of witnesses who live in the houses on Chicago street near the point of collision that the two cars were lighted and could be seen and heard for some distance a block or more before they reached the intersection and two of these witnesses testify to seeing the headlight burning.

There is evidence to show that the collision did not occur at the street intersection and that the driver of the truck was not attempting to cross appellant's track at the intersection but at the time the collision occurred the driver had turned the corner at the intersection and was driving south on Chicago street on appellant's track and that the turn could not be made without driving upon appellant's track.

We are of the opinion from an examination of the





record that there was some evidence fairly tending to prove the charge of negligence in each count of the declaration and that there was some evidence tending to show that appellant was in the exercise of ordinary care for his own safety. This required the submission of the case to the jury on each count. *Lindquist vs. I. C. R. R. Co.* 305 Ill. 106. The court submitted the case to the jury under proper instructions and we cannot say that the verdict of the jury was so manifestly contrary to the weight of the evidence as to be the result of passion or prejudice, or the result of a misconception of the nature of the case.

It is contended that the court erred in refusing to admit evidence of a statement made by Hunter, the driver of the truck immediately after the collision "It was my fault." This statement was not a part of the **res gestae** and was properly excluded. 3 *Wigmore on Ev. Sec. 1748*; *People v. Willy* 301 Ill. 307; *Schuman v. Bader* Ill. App. (7302) 3d

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It is claimed by appellant the court erred in the admission of evidence. The evidence that an accident occurred the next day after the one involved in this case was improper, but this evidence went in without objection. Objection might well have been sustained to the questions to which objection was made on the ground that they did not tend to impeach the conductor on a material matter, but as there was no question in the case but what the car and the truck came together with sufficient force to do considerable damage to each, we fail to see how proof of a statement by the conductor in speaking of the collision between the car and the truck, "We hit it just like running into a freight train" could so prejudice appellant as to constitute reversible error.

Finding no reversible error in the record the judgment is affirmed.

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General No. 7502

Agenda No. 56

October Term, A. D. 1922

Daniel Rich, et al, Appellants

vs.

Community High School Board of Education of Deer

Creek Community High School District No. 310

Counties of Tazewell and Woodford, State

of Illinois, et al, Appellees

Appeal from Tazewell.

HEARD, J.

This is a suit in chancery for injunction and relief brought by Daniel Rich and more than sixty other residents and taxpayers in the Deer Creek Community High School District in Tazewell and Woodford Counties, Illinois, to enjoin and restrain the Board of Education of said Community High School District from paying out, and certain contractors, architect and other persons from receiving, money belonging to said District on alleged illegal contracts for the erection of a Community High School building in said District.

Upon presentation of the bill, one of the judges of the 10th Judicial Circuit issued a temporary injunction which, soon afterwards, the other two judges, sitting together modified and dissolved, when motion and affidavits prior to any testimony being taken on the issues involved. Answers were filed, and issues being joined, the cause was referred to the master in chancery of the Tazewell county circuit court to take and report proofs and findings together with proofs and findings as to damages to be awarded to the appellees Lampitt & Son, and Zimmer upon their petitions for damages growing out of the wrongful suing out of the injunction. A report was made by the master and thereafter by leave of court appellants amended their bill of complaint and the cause was referred to the Master in Chancery who after a further hearing reported in favor of dismissal of the bill for want of equity and the allowance of the sum of \$150 to appellee Zimmer for his damages and the sum of \$865 to Lampitt and Son. After a hearing upon exceptions to the Master's report the court entered a decree in accordance with the recommendations of the Master from which decree this appeal has been taken.





The bill was filed March 5, 1921 and alleges among other things that on or about September 4, 1920, the said Deer Creek Community High School District No. 310 was organized and that it included territory in Tazewell and Woodford Counties, and that complainants reside in and

Page 1

own taxable property therein; that the value of the taxable property situated in said district as ascertained by the last assessment for state and county taxes was \$819,510.00; that by a majority vote of the legal voters within and for said Community High School District, the said district was duly authorized to issue Community High School District Bonds to the amount of \$40,000.00 for the purpose of purchasing a suitable site and erecting and completing, finishing and equipping a community high school building thereon for community high school purposes for said district, and that thereafter pursuant thereto, the defendants, J. A. Ellis, C. M. Chapman, J. S. Nixon, George P. Zern, W. R. Lee and J. M. Davis, constituting the Board of Education of said school district, issued and sold said Community High School Bonds for \$40,000.00, par value, and that all said bonds are now outstanding unpaid and are a valid indebtedness against said District; that said Board of Education have heretofore made and entered into certain pretended contracts in writing in the name of the said Community High School District in favor of Ed F. Lampitt & Son, general contract for erection of the said proposed high school building, not including hardware, structural or reinforcing steel, electric wiring, electric lighting fixtures, painting, decorating, heating, plumbing, seating, or any educational equipments whatever, for the contract price of \$39,143.00. To Fred C. Trompeter, for all structural steel,

reinforcing bars; etc., necessary to complete building -----	\$1982.00
To J. C. Boyer, for painting and decorating ----	1300.00
To American Seating Company, for school seats	1012.50
To R. D. Anderson, for electric wiring and electric fixtures -----	870.00
To John E. Zimmer, for architect services, estimated at -----	3000.00

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Thereby amounting in the aggregate to the tot-

al sum of ----- \$47,307.50

That in order to make the proposed community high school building fit for the uses and purposes for which it is intended to be built, and used, it is necessary for the same to be equipped with a proper system of heating and ventilating and a proper system of plumbing; that said Board of Education are now considering proposals and bids for the purchase and installation for the said necessary system of heating, ventilating and plumbing for said building, without which the said building would be useless and unfit for a community high school district building; that the

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necessary system of heating, ventilating and plumbing for said proposed building will cost in the aggregate of \$10,000.00; that the aggregate amount of all the aforesaid contracts heretofore let and awarded in the name of and against the said community high school district, plus the further and additional contracts for said suitable, proper and necessary systems of heating and ventilating and plumbing will amount to the sum of not less than \$57,307.50, but that the total amount which the said school district can now lawfully be and become indebted for any and all purposes is five per cent of \$819,510.00, and is the sum of \$40,975.50; that of the proceeds of said bonds, said Community High School District now has only \$32,686.09, and has no other money whatever with which to pay the aforesaid aggregate sum of its awarded contracts to-wit: \$47,307.50; all of which, so far as the same exceeds the sum of \$32,686.09, are unlawful, unconstitutional and void; that unless said High School District building shall be equipped with a proper, suitable system of heating and ventilating and plumbing, which will cost not less than \$10,000.00 additional, all the expenditures of the said sum of \$32,686.09 upon and to apply on and as a part of the payment of the aforesaid \$47,307.50 will be a wanton waste and squandering of the funds of said Community High School District, for the reason that the said building without suitable heating, ventilating and plumbing systems therein will be valueless and useless for the only use and purpose com-





plainant's property can be required to pay for the same.

Lampitt & Son and Zimmer filed answers admitting the allegations as to the organization of the district, the issuance of the bonds, the valuation of the property of the District and the making of the contracts with them but not the amount of the contracts and allege that at the time their contracts were made, they were within the constitutional limits of the taxing power of said district and that said contracts were and are valid contracts against said District. The Board of Education and the District Treasurer answered admitting and setting up the matters set up in the answers of Lampitt & Son and Zimmer and also alleging that as a part of their duty as members of the Board of Education of said district, they caused a levy of \$8,000.00 for building purposes, which is within the limits allowed by law, to be levied upon the taxable property of said district and that at the same time they caused a levy to be made upon the taxable property of said

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district of the sum of \$8,000.00 for educational purposes for said Community High School District, and that said levies are now available in addition to the proceeds of the sale of said bonds for the purpose of erecting, completing and equipping said community high school building and conducting a community high school in said district; and that the indebtedness of said district is not in excess of the constitutional limits; that the order for structural steel from the defendant Fred B. Trompeter was for material for use in said building and that it was paid for out the \$8,000.00 levy for building purposes and that no additional indebtedness against the district was incurred thereby; deny their intention to create an illegal indebtedness but say that they have a right by law to levy assessments from year to year for building purposes, to complete and equip the building.

The amendment to the bill alleged the employment of two teachers for an aggregate of \$3100 and the employment of a janitor at an annual salary and that these contracts constituted an indebtedness against the district which must be counted as a part of the total indebtedness of the district. The evidence as to these items is



that they were not hired by the year but only from month to month and that their compensation was paid out of the \$8,000 levied for educational purposes.

It is contended by appellants in their arguments that the amount of all these contracts must be added to the \$40,000 bonded indebtedness because there never was a resolution of the Board appropriating any part of the bond issue for the payment of these contracts. As to the \$8,000 tax levied it was stated in the certificate of levy to be for building purposes and that was all the appropriation that was necessary as far as it was concerned. Oct. 9, 1920 before issuing the bonds, after receipt of proper petition the Board of Education adopted a resolution reciting: "That this board has made estimate of the amount required to purchase a suitable site and to build thereon a high school building and has determined that such amount is in excess of \$40,000.00."

Said resolution further provided for the calling of an election to be held on November 5, 1920, in said district to vote on the proposition of locating a school site; purchasing a school site, building a school house on the site selected and the proposition to issue

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\$40,000.00 bonds

of the district.

The election was held on said date and at the election all of the propositions having carried, on December 16, 1920, at a meeting of the Board of Education, a resolution was passed providing for the issuance of \$40,000.00 school site and building bonds pursuant to said election. Said resolution provided that the money derived from the sale of the bonds was to be used for the purchase of a site and the erection thereon of a high school building which was estimated to cost in excess of \$40,000.00. Said resolution provided the form of the bond and recited therein that said bonds were to be issued for the purpose of purchasing a school site and erecting a high school building thereon. This certainly amounted to an appropriation of the funds derived from the sale of the bonds for building purposes.

Counsel for appellants contend that after the issuance of the \$40,000.00 bonds, contracts could not be let to be paid out of the bond proceeds but that such





proceeds must be expended upon a cash or pay as you go plan. This contention is to absurd to require discussion.

The money derived from the sale of the \$40,000 bonds has been legally appropriated for building purposes. We are of the opinion that the evidence in the case in letting the contracts in question the Board of Education did not violate sec.12 of act 1X of the constitution which provides that "No county, city, township, school district or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to any account, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for and county taxes previous to the increasing of such indebtedness.

The evidence is to the alleged contracts for painting, electric wiring and school seats was that no such contracts had been let; that estimates had been made with the understanding that when the finances of the district were in such shape that contracts for the doing of such work could legally be made contracts would be let.

In our opinion while the evidence shows that it was the intention of the Board of Education to complete the



building at some time and that to do so would require the making of other contracts for the expenditure of several thousand dollars, yet the evidence also shows that the Board of Education was aware of the constitutional limit upon indebtedness and that it was their intention not to violate this constitutional inhibition but to complete the building out of taxes levied from year to year for building purposes as they had a legal right to do. *People v. C. & T. R. R. Co.*, 223 Ill. 448; *People v. Crear*, 300 Ill. 611.

We are of the opinion that the court did not err in dismissing the bill for want of equity as to all of the defendants.

It is insisted by appellants that the court erred in assessing damages against appellants. The injunction having been properly dissolved it necessarily follows that appellees should be allowed their reasonable attorney's fees for procuring a dissolution of the injunction and the damages which they have suffered by reason of the issuance of the same.

The court in the decree allowed to appellee Zimmer the sum of one hundred fifty dollars for attorney's fees for the dissolution of the injunction. The evidence shows that the services were necessary and that the amount allowed was the usual reasonable and customary charges for such services.

The Master found and the court approved the finding and decreed accordingly that appellee Lampitt & Son was entitled to \$865.00 for damages and reasonable attorney's fees on account of the issuance of the temporary injunction. The items making up this sum were For loss in delay and increased labor for mill

work .....	\$50.00
Delay and extra work in handling stone .....	25.00
Damage to foundation and extra work and excavation	

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by reason of damage done by water, labor and

loss on sand .....	\$ 40.00
On account of loss of time and decreased efficiency of labor on account of weather conditions, as shown by testimony .....	350.00
Extra time for mixing mortar .....	50.00
For reasonable attorney's fees .....	350.00





Each of these items seems to be supported by the evidence and there was no error in their allowance.

We are of the opinion that substantial justice has been done in the matter and the decree is therefore affirmed.



October Term, A. D. 1922

Cortland M. Grantham, Appellant

vs.

Smith Gwinn and Will McKenzie, Appellees

Appeal from Coles.

HEARD, J.

This was a suit in replevin for a motor truck brought by appellant against appellees. Appellees plead property in themselves. Jury was waived and it was tried by the Court with judgment in favor of appellees for possession and return of the property. From that judgment appellant brings this appeal.

On September 25th, 1920, J. Dell Waltrip, of Charlestown, Illinois, purchased the truck in controversy from appellant, trading in an old truck with the balance of the purchase price represented by his note for \$1,265.00, due 12 months after date, secured by a chattel mortgage on the new truck. This chattel mortgage was executed and acknowledged before a police magistrate, but was held by appellant without being filed for record until the 4th of January, 1921, and on that day it was filed and recorded. The existence in good faith of this chattel mortgage, for the consideration named was stipulated by counsel. The mortgagor, J. Dell Waltrip, had been indebted to appellees here, and on the 6th day of October, 1920, in the period between the execution of the mortgage to appellant and the filing of the same for record, Smith Gwinn, one of the appellees, procured the mortgagor to give a mortgage to appellees upon the same truck. This mortgage to appellees was executed and acknowledged on the 6th day of October, 1920, and filed for record October 7th, 1920, about 3 months before the recording of the first mortgage given to appellant.

As stated by appellant in his brief the issue in this case is, did appellee, Gwinn, agree with J. Dell Waltrip, at the time he took the mortgage of the appellees, that it would be second to the mortgage already given, but not recorded, of appellant Grantham. Appellant <sup>interview Waltrip</sup> testifies that Gwinn not only had notice of appellant's mortgage, but in addition orally agreed that appellee's mort-





gage should be second. He is corroborated by a witness, McElhiney who testified that in April 1921 he had a conversation

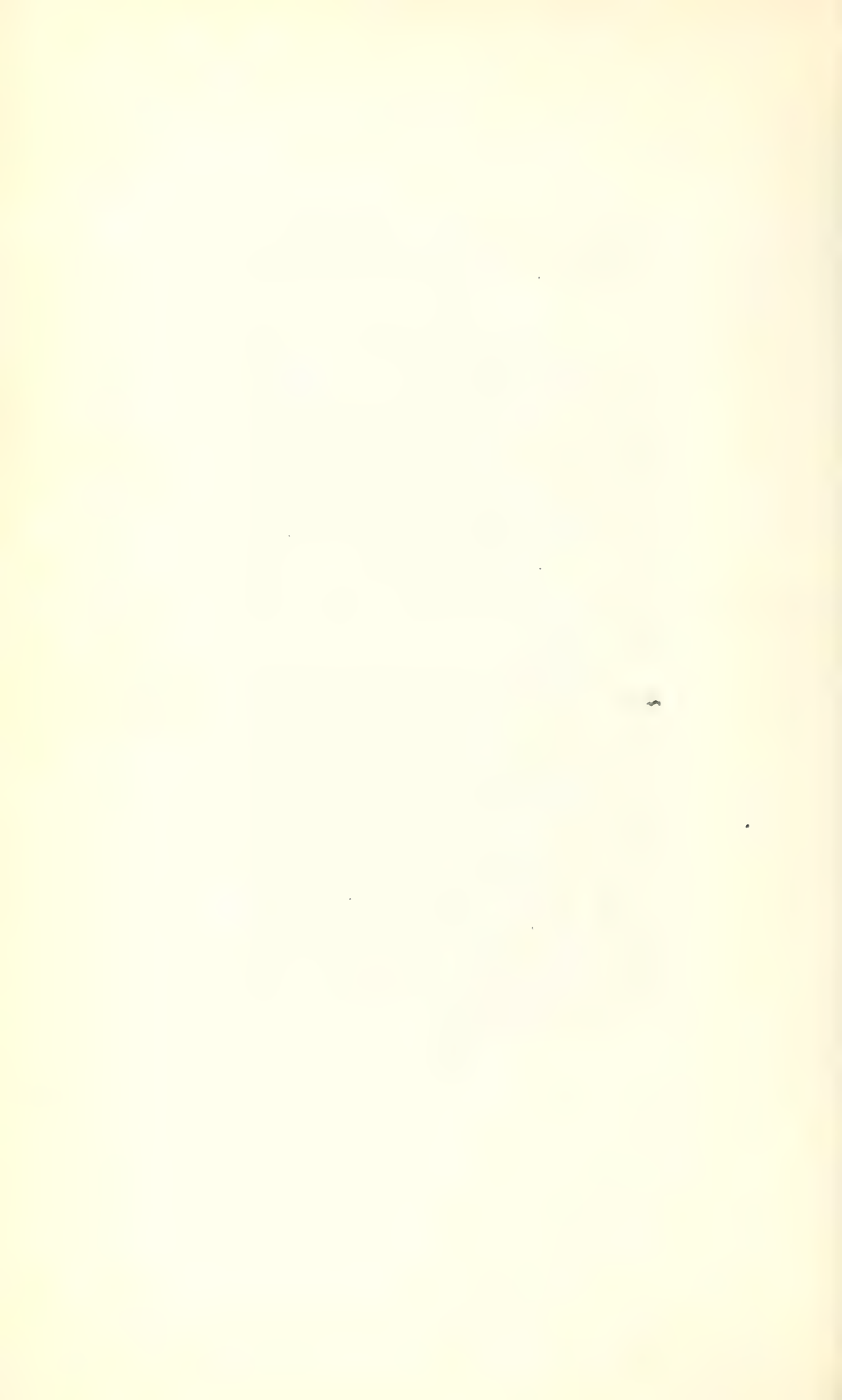
Page 1

with Gwinn in which Gwinn told him that he knew this mortgage was on the truck when he took it and that Mr. Waltrip had told him when he was giving the mortgage that his must be a second mortgage, that there was already another mortgage on the truck, and that Gwinn further said that he agreed with Waltrip that it should be a second mortgage. On the other hand, Gwinn denied positively that at the time of the making of the mortgage to appellees he knew of appellant's mortgage and denied positively that he had agreed with Waltrip that appellee's mortgage should be a second mortgage. He also was positive in his denial that he made the statements to the witness, McElhiney to which McElhiney testified.

In the language of the Supreme Court in *Marble v. Marble* 304, Ill. 229 the condition of the record is such that an appellate court would not be justified in setting aside the finding of the trial court on the ground that it is contrary to the evidence. To do so the Appellate Court must find that the finding is manifestly against the weight of the evidence, after taking into consideration the better opportunity of the trial court to determine the question by reason of its opportunity to see and hear the witnesses. There was ample evidence to sustain a finding either way when only the evidence on one side is considered, and when all the evidence is considered it is too evenly balanced to enable the court to say that a finding either way is manifestly against its weight.

The judgment is affirmed.

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General No. 7508

Agenda No. 20

October Term, A. D. 1922

J. B. Colt Company, A Corp. Appellant

vs.

John F. Metzger, Appellee

Appeal from Pike.

HEARD, J.

This is an appeal from a judgment in bar and for costs in an action of assumpsit brought by appellant against appellee to recover the contract purchase price of an acetylene lighting plant, for which appellee had given appellant a written order.

Appellant filed the plea of the general issue to appellant's declaration and also a plea of fraud and circumvention as to the obtaining of his signature to the contract of purchase in question.

The negotiations for the sale of the lighting plant were had by appellee and an agent of appellant, a signed written order given by appellee to the agent, the order by him forwarded to appellant, by it accepted and the materials forwarded to appellee, who shipped them back to appellant.

Upon the trial the court permitted appellee over the objection of appellant to prove the conversation of appellee and the agent leading up to the signing of the order by appellee and to prove that the terms of the agreement between the agent and appellee were other and different from the terms expressed in the written order and this action of the court is assigned as error.

The law is well settled that when parties reduce to writing their agreements as finally agreed upon by them, all

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prior negotiations leading up to the execution of the writing are merged in the writing, and that parole evidence is not admissible to explain, contradict, enlarge or modify the writing as it exists when executed. Clark v. Mallory 185 Ill. 227; Memory v. Niepert, 131 Ill. 623; Davis v. Fidelity Insurance Company 208 Ill. 375.

In the present case this evidence was not admitted for the purpose of attempting to explain, contradict, en-





large or modify the terms of a contract, but for the purpose of showing that for the purpose of securing appellee's signature to the order in question, appellant's agent had made to appellee a positive statement of a material fact as true which he knew to be false, intending appellee to rely upon it as true.

The undisputed testimony in the case is that after the negotiations between the parties were had and agreement as to terms reached by the parties, appellant's agent prepared the contract and handed it to appellee; that appellee's glasses did not suit his eyes; that appellee undertook to read it and could not; that appellee told the agent he could not read the fine print; that appellant's agent said, "I'll read it to you" and read about one third of it and then said, "That's about all that amounts to anything. The rest of it goes on to what we were talking about;" that appellee believed that the unread portion of the contract contained what they had been talking about and signed it with that belief; that the unread portion of the contract did not contain the things they had been talking about, but other and entirely different matter.

The material statement which was claimed to be false was that the unread portion "goes on what we were talking about" and to determine its falsity it was therefore necessary and competent to prove the prior conversation between them.

In *Gilbey v. Hamlin* 297 Ill. 258, it is said, "When one party to a transaction makes a positive statement of a material fact as true, which he knows to be false, but intends to be relied upon by the other party as true, and the statement actually

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is relied and acted upon as true by the other party, the party making the statement cannot charge the other with negligence in believing the false statement or take any benefit from it." To the same effect is *Woodruff v. Day* 278 Ill. 199.

Under the undisputed evidence in the case plaintiff was not entitled to recover and the judgment is therefore affirmed.

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General No. 7516

Agenda No. 26

October Term, A. D. 1922

Martha E. Linthicum, Appellee

vs.

Morilla C. Linthicum, Appellant

Appeal from Macon.

HEARD, J.

This is an appeal from a decree of the circuit court of Macon County in a suit for separate maintenance brought by appellee against appellant.

Appellee's amended bill of complaint upon which, and appellant's answer thereto, the cause was heard, after setting up her residence, alleges that on, the 28th day of August 1919 she was married to appellant and continued to live with him until the 13th day of September 1920, when he without any cause whatsoever, deserted her and ever since has refused to live and cohabit with her; that during the time she and appellant cohabited as husband and wife she conducted herself as a chaste and dutiful wife should, and at all times treated him with kindness and forbearance; that he, a short time after said marriage, commenced a course of unkind, cruel and inhuman conduct towards her; that he assaulted, beat and struck her; that he was arrested for such assault, pleaded guilty and paid a fine for the same, and that he was guilty of extreme and repeated cruelty; that he is a man of violent passion and ungovernable temper, and that on many occasions he has addressed her with the most approbrious epithets and threats of violence; that she has been ready and willing at all times to live and cohabit with him, but that he persistently refused to so live and cohabit with her; that he is an able bodied person, and by profession is a school teacher, and is now earning, and has been for some time earning the sum of one hundred forty dollars per month; that he is a strong and healthy man, and abundantly able to take care of and support her, but he refuses and neglects to provide her with the proper and necessary support and maintenance, and refuses to live with her and communicate with her in anywise.

Appellant answered denying all charges of misconduct on his part except that on one occasion during an





altercation provoked by her conduct, he lightly slapped her, for which he afterward apologized to her and was by her forgiven as she said. The answer denies that she is living

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separate and apart from him without her fault but admits that he refuses to contribute to her support or to live or communicate with her in anywise, and has since said separation persistently so refused.

After a trial before the court, the court entered a decree ordering appellant to pay appellee the sum of twenty-five dollars per month, payable in advance on the 1st day of each and every month, said first future payment to begin on April 1st, A. D. 1922, and to continue until the further order of the Court and that he pay to the Clerk of the Circuit Court as cost in the case, the sum of thirty-five dollars, the same to be paid to Whitely & Fitzgerald as solicitors for the complainant herein, and that said sum should be paid within ten days after the filing of the decree and that he pay the costs of the suit.

It is contended by appellant that under the facts in this case the complainant was not entitled to a decree for separate maintenance for the reason that the evidence did not show that she was living apart from appellant without her fault, as required by the statute.

As very frequently happens in this class of cases the evidence is irreconcilable and absolutely inconsistent with the theory that both parties are attempting to tell the truth. No good purpose would be served by analyzing the evidence and discussing it in detail in this opinion. Suffice it to say that if appellee and her witnesses are to be believed she is living separate and apart from her husband without fault on her part while if appellant and his witnesses are believed she is not living apart from her husband without fault on her part. The trial court who saw and heard the witnesses found the issues in favor of appellee, and his finding having the same force and effect of a jury finding we could not be justified in saying that his finding was so manifestly against the weight of the evidence as to be the result of prejudice, passion, sympathy or a misconception of the evi-



dence.

It is contended by appellant that under the pleadings the Court had no authority or jurisdiction to require the payment by appellant of any sum whatsoever by way of separate maintenance or to enter a decree therefor for the reason that it is not alleged in the amended bill that appellee, at the time of filing her bill in this cause, was living apart from appellant without her fault, and that such fact is not contained in the

**Page 2**

findings of the decree.

The evidence having been preserved by certificate of evidence, it was not necessary that the decree should contain any findings of fact.

The amended bill alleges and the decree finds that appellant "Without any cause whatsoever deserted said complainant and ever since has refused to live and cohabit with her." "That the said complainant has at all times been ready and willing to live and cohabit with the said defendant but that said defendant persistently refuses to live and cohabit with said complainant." While neither the amended bill nor the decree uses the exact words of the separate maintenance statute the language used is equivalent to an allegation that she was living separate and apart from her husband without fault on her part.

It is contended that the allowance for alimony is excessive. The amount of alimony to be allowed in each case depends largely upon the discretion of the court having regard to the circumstances and conditions of the case as shown by the evidence and while an abuse of such discretion is subject to review upon appeal, we do not think such abuse of discretion has been here shown.

It is contended by appellant that the court erred in decreeing appellant to "pay to the clerk of the Circuit Court, as cost in the case, the sum of thirty-five dollars, the same to be paid to Whitely & Fitzgerald as solicitors for the complainant herein, and that said sum should be paid within ten days after the filing of this decree." This was error. While it would have been proper for the court to have included in the allowance to appellee in the decree the amount of her counsel fees earned in the prosecution of the suit (Blake v. Blake 70 Ill. 618) the





allowance should have been to complainant for her counsel fees and not to her counsel direct. *Anderson v. Steger* 173 Ill. 112.

This decree, otherwise than as to the provision for solicitor's fees is affirmed, and as to such provision the decree is reversed and the cause remanded for further proceedings (if desired by appellee) not inconsistent with the views herein expressed. The costs in this court will be paid as follows: the appellant will pay fourth-fifths thereof and the appellee the remainder.

Affirmed in part. Reversed in part, and remanded.



October Term, A. D. 1922

Charles Brenner and Stella Brenner, Appellees

vs.

The Estate of Emily E. Baker, deceased. The Casey M.  
E. Church south of Casey, Ill., Appellant

Appeal from Clark.

HEARD, J.

This is an appeal from a judgment for \$2825 in favor of appellees upon a claim filed by them against the estate of Emily E. Baker, deceased, for board, lodging, washing, mending, and care furnished deceased during the period of five years prior to the death of deceased during which time and for a number of years prior thereto the parties had been living together.

The evidence shows that Stella Brenner, one of the claimants herein was left an orphan child of the age of thirteen years, and went to live with her aunt, Emily E. Baker and her husband, on a farm southeast of Casey, Illinois; she attended public school and grew to womanhood; the aunt, her husband, the niece all lived together as one family until 1910, when Mr. Baker, the husband of Emily E. Baker, departed this life leaving Mrs. Baker his widow surviving; thereafter the aunt and niece continued to live together on the same farm for two or three years, when the niece married Charles Brenner, the other claimant herein, at the home of Mrs. Baker, the aunt, and thereafter they continued to live with Mrs. Baker for a few years, and until she sold her farm. The Brennens then moved into a small building not far from the old farm and Mrs. Baker visited and lived with some of her relatives and friends for a short time, and then she moved in with her niece and husband (moving her household effects into the house also) and lived with them thereafter in the same house until her death, in June, 1920. There is evidence tending to show that during the five years prior to her death deceased suffered from organic heart trouble and at times had spells which kept her in bed two or three days at a time; that from time to claimants waited upon and gave her needful attentions, one of appellees witnesses expressing it that Stella performed services for deceased such as any girl





would perform for a mother while in bad health. The last illness of deceased extended over a period of about six weeks during which time she was bedfast and during which time claimants took care of her with the

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assistance of neighbors who helped some during daytime and sat up with her at night. She left a last will and testament in and by which she gave to claimant Stella Brenner \$500.

No evidence was introduced by either party as to what arrangements, if any, there were between the parties as to their living together. T. N. Wright, a witness for claimants testified "They lived as one family, same house and same table and acted like mother and daughter." Andrew Lee another witness for claimants testified "They lived as one family." Mary Robertson, a witness for claimants testified "They lived as one family." Thomas Stiff, witness for claimants testified "They were living as mother and child. It looked like that." Mae Poe witness for claimants, "They lived just as one family, like mother and daughter." These were all of claimants witnesses except three.

From this evidence from witnesses produced by claimants it may be considered as established that the services were rendered by persons near of kin to deceased and that at the time of their rendition the parties sustained a family relation to each other and that the rules of law applicable in such case are applicable here. In *Heffren v. Brown*, 155 Ill., 326 it was said: "Where services are rendered by one admitted into the family as a relative, the presumption of law is that such services are gratuitous, and that the parties do not contemplate the payment of wages therefor. This presumption, however may be overcome by proof. The proof necessary to overcome the presumption may be either of an express contract, or of a contract established by such facts and circumstances as shown that both parties, at the time the services were rendered, contemplated or intended pecuniary recompense other than that which arises naturally out of the family relation. (*Miller v. Miller*, 15 Ill, 296)"

The only testimony bearing upon this question is that of Dessie Zeiter who drew deceased's will about two years prior to her death and who said she had a heart to



heart talk with her at that time in which deceased told her that she was making her home with claimants; that she did not have her property all cash; it was in a mortgage; that if she lived until her mortgage became due and was paid, she expected to pay claimants for the care they were giving her but she felt she would not live to see the mortgage paid and she was making the will; that if she knew that they would outlive her, she would know exactly how to make the will but said she might out live them and some one else would have to care for her and she said we

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will put whoever cares for me must be well paid.

Thereupon the will was drawn and it contained first a direction for the payment of all her just debts and funeral expenses. The second clause is: "2nd. After the payment of such funeral expenses and debts, I give, devise and bequeath all persons who care for me to be well paid. After all expense are paid I give and bequeath (\$500) five hundred dollars to Stella (Chancelor) Brenner (if she be living or has any living bodily heirs.)"

It is evident from this evidence that deceased at that time did not consider that any legal indebtedness to the Brenner's existed on her part.

After claimant's evidence was closed and a motion made to instruct the Jury to find the issues against claimants, Dessie Zeiter was called to the stand for the third time and although on each of the prior occasions she had been asked to give all the conversation she had had with deceased at the time of making the will, testified that on that occasion deceased "said she asked Charles what he was going to charge and Charles says 'Mrs. Baker that is between you and Stella, whatever Stella and you agree, that is satisfactory with me.' " It is evident from this that up to that time no arrangement for payment for the services had been made and while it might be some evidence standing by itself that she expected to pay therefor it is no evidence that either of claimants expected to receive payment.

Witnesses for claimants testified to seeing occasional services rendered and then gave their estimates as to how much such services were worth per day. The basis





October Term, A. D. 1922

Otto A. Mohrenstecher, Appellee

vs.

James H. Andrews, Appellant

Appeal from Adams.

HEARD, J.:

This is a suit in assumpsit brought by appellee against appellant to recover rent alleged to be due appellee from appellant for certain premises in Quincy, Ill.

The declaration consisted of the common counts and a special count which set up that appellee being the owner of certain real estate in Quincy, Ill., on March 31st, 1917, entered into a written 99 year lease thereof, from April 1, 1917, with one John A. Spanople; that thereafter on August 23, 1917, said Spanople assigned said lease and all his rights thereunder, to appellant who from thence hitherto has been and still is the assignee of said Spanople; that appellant thereafter paid to the appellee the rent stipulated and provided, to-wit: Eight-Five Dollars per month, for the month ending August 23, 1917, and then and there undertook and promised and became liable, to pay to appellee said sum of \$85.00 as rent for each and every month thereafter, as stipulated and provided for in said indenture; that appellant has wholly failed and refused to pay to the appellee said rent from August 23, 1917 up to the present time, etc. Appellant filed a plea of the general issue and nine special pleas. A demurrer was sustained to all the special pleas except Nos. 2, 3, 4 and 9, to which pleas replications were filed and issues formed.

Upon the trial, at the close of appellees' evidence, and again at the close of all the evidence, motions were made by appellant to instruct the jury in his favor, which motions were by the court denied. At the close of all the evidence at the request of appellee the court instructed the jury to find the issues for appellee and to assess his damages against appellant at \$1995.00 and the jury returned a verdict accordingly upon which, after overruling appellant's motion for a new trial, the court rendered judgment from which this appeal is taken.



It is contended by appellant that the evidence in the case entirely fails to show any liability on the part of appellant for the

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rent in question and that the court erred in giving its mandatory instruction.

Appellant's plea alleged that on Mar. 31, 1917, appellee wrongfully and unlawfully withheld from possession of said defendant and his assignor the premises set out in said lease and continued to so do withhold possession of said premises from defendants assignor and from defendant from that time down to the time said declaration was filed, and did not deliver possession, to defendant or defendants assignor, of the premises mentioned in said lease but withheld possession and failed to let defendant or his assignor in to possession of said premises.

By his 4th plea, appellant set up that the plaintiff after the making of the said lease mentioned in said declaration and before any of the supposed breaches assigned to-wit on Mar. 31, 1917, refused to let defendants assignor into possession of the premises mentioned in the said lease set out in plaintiff's declaration and has from thence hitherto withheld from defendant and defendants assignor the possession of said premises.

When a motion is made to direct the verdict upon the trial of an issue, the party against whom the motion is directed, is entitled to the benefit of all the evidence in his favor in its aspect most favorable to him, and of all presumptions that may be reasonably drawn from such evidence. The evidence is not weighed and all contradictory evidence or explanatory circumstances must be rejected. *Pluym v. I. C. R. R.* 220, Ill. App. 554. A verdict for a plaintiff should never be directed when the plaintiff has totally failed to prove any one of the elements necessary to constitute a cause of action.

While there is in evidence in the case of an assignment from Spanople to appellant, there is no evidence that appellant accepted the assignment, entered into possession of the premises, or that he at any time occupied the same and while the special count in appellee's declaration places appellant's liability upon the payment of one month's rent, this allegation is disproven by appellee who testified to the receipt of one month's rent





from Spanople and that he received none from Appellant. There is no evidence of privity either of contract or estate.

It is contended by appellee that within two months after the

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execution of this assignment, appellant sought to enforce the option provided for in the lease by filing a suit for specific performance; that after the trial court, dismissed his bill for want of equity, appellant carried the suit to the Supreme Court of this State, calling attention to *Andrews vs. Mohrenstecher*, 295 Ill. 109, and that such conduct amounts to an acceptance. We have searched not only the abstract but the record and find nothing whatever in the evidence to sustain this contention.

It is evident that the judgment cannot be sustained under the special count of the declaration. *Kennedy v. Ill. N. U. Co.* 217 Ill. App. 292.

In his brief and argument appellee repeatedly says it is undisputed that appellant went into possession of the premises, demised and remained in such possession until evicted therefrom after the bringing of this suit by forcible entry and detainer proceedings March 30, 1921, and that the common counts being a part of the declaration, appellee was entitled to recover, under the common counts for use and occupation of the demised premises. The difficulty with this contention is there is no evidence whatever to show that at any time during the period for which rent is claimed that appellant was in possession of, or used and occupied, the premises.

Liability cannot rest upon surmise, guess or conjecture, but must rest upon evidence fairly tending to prove every material element necessary to constitute a cause of action and we cannot, therefore, in the absence of evidence on the subject, surmise, guess or conjecture that appellant used and occupied the premises. *Burns v. C. & A. R. R. Co.* 223 Ill.App.439.

It is contended by appellee that this question is raised in this court for the first time and cannot therefore be considered. The question was raised in the court below by the general issue and by appellant's second and fourth pleas, as well as by appellant's motions to direct a ver-



diet which were general and did not set forth the specific grounds on which they were based.

This case must be governed by the record before us and not by what it might have shown if other evidence had been introduced. From an examination of this record, it is manifest that the court erred in instructing the jury to find the issues for appellee and the judgment is, therefore, reversed and the cause remanded.

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## IN THE APPELLATE COURT OF ILLINOIS

## FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

C. W. PARKER,

vs.

CHARLES DAVIS,

Appellee,

Appellant.

Appeal from the  
Circuit Court of  
Madison County,  
Illinois.

Opinion by Boggs, P. J.

Suit was instituted by Appellee against Appellant in the Circuit Court of Madison County to recover the balance alleged to be owing on a lease contract for a certain Carry-us-All, or Merry-go-Round with option to purchase.

The declaration consists of the common counts accompanied by an affidavit of merits. To this declaration Appellant filed a plea of the general issue with an affidavit of merits and two special pleas. The special pleas are in effect the same and allege that Appellant bargained with Appellee to buy a certain "Carry-us-All" for \$4,266.00; that in order to induce said purchase Appellee fraudulently represented and warranted that the same had only been operated one season whereas it had been operated several seasons; that it had five hundred electric lights, whereas it only had one hundred forty; that it had brass rods, whereas it had iron rods; that it was to have Crown scenery with French plate mirrors, whereas it had no mirrors; that it was to be equipped with fourteen medallions with mirrors, whereas it had no mirrors; that it was warranted to have a canvas top in good condition and repair; whereas the same was rotten, torn and unfit for use; that it was otherwise falsely and fraudulently represented to be in first class condition; and that Appellant relied on said representation and warranties. Said pleas further represented that Appellant had paid to Appellee and Appellee had accepted \$2,900.00 in full satisfaction and discharge of the amount sued for in said suit.

To these pleas Appellee filed a replication, denying all the material averments therein and averring that prior to and at the time Appellant purchased such "Carry-us-All", he had full opportunity to inspect and had thoroughly inspected and examined the same, and that if it did not comply with the character of machine which he was to have under said contract, that by having accepted the same with full knowledge of its condition he waived his right to insist that the machine did not so comply with the contract.

A trial was had resulting in a verdict and judgment against Appellant for \$2,500.00. To reverse said judgment this Appeal is prosecuted.

*Petition for Re-hearing*



The principal grounds relied on for a reversal of said Judgment is that the Court erred in its rulings on the evidence and on the instructions. The evidence on the part of Appellee tended to show that Appellee, who resides in Leavenworth, Kansas and is engaged in the manufacture of "Carry-us-All", "Ferris Wheels", and other amusement devices, entered into a lease with Appellant in and by which he was to furnish "One Standard, three-horse-abreast, jumping-horse, 'Carry-us-All', in good second hand condition, with style 125 Organ, one Lover's Tub, trolley system for lights, tent top and side walls and the necessary tools required to erect and take down." Said lease provided that Appellant should operate said "Carry-us-All" and should pay Appellee as rent therefore, twenty per cent of the gross receipts therefrom. There were other provisions in the lease which are not material to the issues in this case. To secure the payment of said rental and any damages that might occur to the "Carry-us-All" through the failure of Appellant to operate the same according to the terms of said lease, Appellant deposited with Appellee the sum of \$500.00. Said lease also provided that an option should be given to Appellant to purchase said "Carry-us-All" at any time prior to the 1st day of October, 1916, for the sum of \$4,266.00, together with interest thereon from the date of the lease. In the event of such purchase, the \$500.00 so deposited by Appellee and ninety per cent of all rentals paid prior to the date of such purchase was to be applied on said purchase price.

The "Carry-us-All" was shipped to Appellant about May 1st, 1916. Thereafter Appellant, up to September 1916, sent weekly statements with checks or drafts for twenty per cent of the gross proceeds as provided in the contract. September 12th, 1916, Appellant mailed Appellee a check for \$1,000.00 as part payment on the purchase price of said machine. Thereafter no remittances were sent in by Appellant and he has had the custody and control of said machine since that time. Appellee further testified that the "Carry-us-All" which he shipped to Appellant was the one described in the contract; that it had been built in 1915 and had been operated for the season of 1915 and that that was the only service it had had prior to its being shipped to Appellant. He further testified that there was due on said contract the sum of \$2,649.98, after crediting Appellant with the \$500.00, he had deposited when the contract was signed, the \$1,000.00 he mailed in on Sept. 12th, 1916, and after crediting him with the rentals above mentioned.

On cross-examination counsel for Appellant sought to develop that prior to the execution of the lease or contract sued on, Appellee stated to Appellant that if Appellant would purchase a two-abreast "Carry-us-All" that he had, that he would give him a lease of a "Carry-us-All" of a type that he was furnishing under a contract with the Rutherford Greater Shows, Incorporated; and that Appellee had stated that a second hand "Carry-us-All" of the character specified in the Rutherford Contract was worth \$4,266.00. The Court sustained objections to practically all of the questions of this character. It is insisted by counsel for Appellant the Court





erred in so ruling. We are inclined to hold that this was not proper cross-examination as Appellee did not go into any conversation of this character. Appellant testified in his own behalf with reference to said transactions. His counsel sought to introduce the conversations had between Appellee and Appellant prior to the signing of said lease. The Court sustained objections thereto and the ruling of the Court thereon is assigned as error. We are inclined to hold there was no error in refusing to allow Appellant to testify with reference to these conversations, as they took place prior to the execution of the contract. Appellant testified that in July, 1916, he saw Appellee in Columbus, Ohio, and that he told Appellee that he would not purchase the "Carry-us-All" under his option; that the machine was nothing like the contract called for; and that Appellee afterward said to him, "Well, Charlie, we are awfully busy in the shop now. If you will take that machine now, exercise your option on it this Fall, we will fix it up just according to the contract." Appellant further testified that with the lease he signed there was attached a copy of a contract made between Appellee and the Rutherford Greater Shows, Inc., and that said Rutherford Contract specified the character of "Carry-us-All" that he, Appellant, had rented and had the option of purchasing.

The Rutherford Contract was offered in evidence, but the Court sustained an objection to the same and refused to allow it to go to the jury. The Court held throughout the trial that no conversation had between Appellant and Appellee either before or after the execution of the lease could be shown, and that the parties were bound by the lease. This ruling of the Court is assigned as error.

The record discloses that the Rutherford Contract, as it is called, was attached to the lease sued on. This being true, we are of the opinion, and so hold, that Appellant was entitled to offer the same with the testimony, in reference to the Conversation with appellee in Columbus, and that this did not amount to the varying of a written contract. Appellant was under no obligation to purchase the "Carry-us-All" in question and if after the lease was executed he purchased the same with the distinct understanding that said "Carry-us-All" was to be similar to the one specified in the Rutherford Contract, he would have a right to show that fact by parol evidence. And if the evidence should be sufficient to prove that Appellee failed to comply with said agreement, Appellant would have the right to recoup his damages in a suit on the contract for the amount unpaid. *Underwood vs. Wolf*, 131 Ill. 425; *Murray vs. Carlin*, 67 Ill. 286; *Higgins vs. Lee*, 16 Ill. 495; *Mears vs. Nichols*, 41 Ill. 207; *Cooke vs. Preble*, 80 Ill. 381; *Wadhams vs. Swan*, 109 Ill. 46; *Tulley vs. Excelsior Iron Works*, 115 Ill. 544. And where the general issue and special pleas have been filed and the evidence is variant from the allegations of the special plea; recoupment is permissible, under a general issue, in a suit for the price of an article sold, where there is a warranty of the article and the evidence shows a breach of the same. *McCormick Harvesting Mach. Co., vs. Robinson*, 60 Ill. App. 253; *Hoerner vs. Giles*, 53 Ill. App. 540.

It is contended by Appellant that the Court erred in giving the one instruction given on behalf of Appellee and in re-



fusing the one instruction offered by Appellant. Without going into a discussion of these two instructions it is only necessary for us to say in view of what we have already said with reference to the right of Appellant to give in evidence the alleged conversation and alleged agreement had between Appellant and Appellee after the execution of said lease and the right of Appellant to recoup his damages, if any, in this proceeding, that the ruling of the Court on these instructions was erroneous.

It is further contended by Appellant that the Court erred in refusing to allow him to offer in evidence a conversation had between him and Appellee in which Appellee is alleged to have offered to sell to Appellant a new "Standard three-horse-abreast, jumping-horse "Carry-us-All", for \$3,249.00. This evidence would not be proper unless it be admitted as tending to show the value of the "Carry-us-All" that Appellant received from Appellee. Inasmuch, however, as Appellant was to have a second-hand "Carry-us-All" and not a new one, we are inclined to think that the evidence was not proper and that the Court did not err in its rulings thereon.

For the reasons above set forth, the judgment of the trial Court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported.





IN THE APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

OCTOBER TERM, 1922

Morris Emmerson as Trustee for The Farmers' State Bank, Belle Prairie; First National Bank, Wayne City; The Ina State Bank, Ina; First National Bank, Woodlawn; Third National Bank, Mt. Vernon; Central Trust Company of Illinois, Chicago; Mt. Vernon Loan and Building Association, a Corporation, and H. W. Faulkner & Company, a Corporation, all of the State of Illinois,  
Appellees.

v.

National Liberty Insurance Company of America, Agricultural Insurance Company of Watertown, New York, and Milwaukee Mechanics' Insurance Company of Milwaukee, Wisconsin,  
Appellants.

Appeal from  
Jefferson.

Opinion by HIGBEE, J.

Appellee, H. W. Faulkner and Company, a corporation, was on and prior to August 6, 1921, the owner of a candy factory in Mt. Vernon, Illinois. The building consisted of a four story factory with basement and a one-story boiler room erected apart from the main building but connected therewith. On April 24, 1920, Faulkner and Company obtained a loan from the Mt. Vernon Loan and Building Association of \$35,000.00, securing the same by a first mortgage upon its real estate. On January 15, 1921, the same company issued eight promissory notes payable to the order of itself amounting to \$45,500.00. These notes were secured by a trust deed and a chattel mortgage upon the machinery, furniture and equipment of the buildings to Morris Emmerson as trustee for the owners of said notes. The appellees, The Farmers' State Bank, Belle Prairie; First National Bank, Wayne City; Ina State Bank, Ina; First National Bank, Woodlawn; Third National Bank, Mt. Vernon, and Central Trust Company of Illinois, were the owners of the notes secured by said second mortgage trust deed and said chattel mortgage. On May 3, 1920, Faulkner and Company secured a fire insurance policy from appellant, National Liberty Insurance Company of America, in the sum of \$100,000 running for three years, and on June 10, 1920, took out a further policy for \$100,000.00 for

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Robert B. Roe  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

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three years from appellant, Agricultural Insurance Company of Watertown, New York. Later on, June 11, 1921, said corporation secured a third policy for \$25,000.00 for one year from appellant, Milwaukee Mechanic's Insurance Company of Milwaukee, Wisconsin. These policies all covered "on the automatic sprinkler equipped buildings of their factory plant and on the contents of said buildings (except as hereinafter excluded) all situated on lots 1, 2, 11 and 12, block 15, Fifth and Jordan Sts., Mt. Vernon, Illinois."

The first two of these policies was obtained through Rufus Grant, the local agent of said companies and the third through P. W. Morgan, local agent for the company named. The agent, Rufus Grant, was cashier of appellee, Third National Bank of Mt. Vernon and said Paul W. Morgan was a stockholder in H. W. Faulkner & Co. The policies were not written by the local agents, but were written by the Western Sprinkled Risk Association, an association of fire insurance companies writing insurance on automatic sprinkler equipped buildings. These policies were by that association sent to the local agents, who countersigned the same. The policies it seemed were never delivered to Faulkner & Company, the assured, but the first two named policies were delivered to the Mt. Vernon Loan and Building Association or its representative. The policy of the Milwaukee Mechanics' Insurance Company appears to have been lost and it is not shown to whom if anyone it was delivered. On August 6, 1921, the main building and the boiler room of H. W. Faulkner & Company and their contents were destroyed by fire. Proofs of loss were made out by the assured and sent to the insurance companies interested but the loss was not paid and subsequently this suit in chancery was instituted to collect the insurance claimed to be due; to foreclose the said mortgages to apportion the funds realized on the insurance policies among the different holders of the notes and for a reformation of the insurance policies by correcting the description of the property insured and by attaching certain mortgage clauses. Each of the insurance policies had attached thereto what had been termed "a loss payable clause" as follows: 'Any loss under this policy that may be proved due the assured shall be payable to the assured and Mt. Vernon Loan and Building Association, subject nevertheless to all the terms and conditions of the policy.'

It is the contention of appellees that at the time these several insurance policies were executed it was the understanding and agreement of the parties that there should be attached to each of them a mortgage clause "in the form usually known as the New York standard form of mortgage clause." This form of mortgage clause provides in substance that any loss or damage payable under the policy shall be payable to the mortgagees of the property insured under certain conditions set out at some length. The bill asked that the policies be reformed by attaching thereto these mortgage clauses instead of the loss payable clause. The bill also asked that the policies be reformed so that the description of the properties covered would more definitely and accurately include the boiler room and contents. Appellants answered the bill after the demurrer thereto had been overruled. Their





joint and several answer admits that Rufus Grant and Paul W. Morgan were agents for the companies as hereinbefore stated; deny that they knew the nature or extent of the interest that Mt. Vernon Loan and Building Association had in the property; deny that appellants had any knowledge of the execution of a second loan or deed of trust and of the chattel mortgage; deny that said agents had knowledge of said chattel mortgage, but aver that if Rufus Grant had such knowledge he acquired the same as agent of the Third National Bank of Mt. Vernon and not as agent of any of appellants, and that he did not convey such knowledge if any he had, to any of appellants. The answer further denies in substance that there was any agreement that the mortgage clauses should be attached to the insurance policies either at the time said policies were executed or when the second loan or deed of trust and chattel mortgage were executed. The answer also alleges that Faulkner & Company had not used due diligence in keeping said automatic sprinkler system in complete working order, and that said sprinkled system was not in good working order when the first occurred, as required by the policies of insurance. The answer further denied a watchman was provided for the building according to requirements of the policies. The court ordered that said policies be reformed as prayed and found that the cash value of the property destroyed by fire was \$226, 121.62, with a loss to the assured of \$223, 755.50, and apportioned the amount to be paid by each of the appellant insurance companies. It decreed the foreclosure of the mortgages and found and declared the amount to be paid each of the appellees.

The record in this case is very voluminous but since the assignment of error, which is not argued, is deemed to have been waived, we are of the opinion that a consideration of the questions raised in appellants' argument, in the order in which they appear, will fully dispose of all the questions necessary to be reviewed by this court.

The first question raised by appellants in their argument is that a court of equity is without jurisdiction to entertain this action. In support of this contention it is claimed by them that the facts stated in the amended bill do not constitute a case cognizable in a court of equity; that it appears upon the face of the record that appellees have an adequate remedy at law for all matters therein complained of, and that there is a misjoinder of the parties complainant and also of parties defendant. In answer to the contention of appellants it is insisted by appellees, among other matters stated, that equity should assume jurisdiction of this cause to avoid a multiplicity of suits. Without discussing the other reasons urged by appellees, we are of the opinion that this is a proper suit for a court of equity to assume jurisdiction of for the reason that it does avoid a multiplicity of suits as that doctrine is applied to a question of equity jurisdiction. The authorities relied upon by appellant to sustain their position are: *Mechanics' Insurance Co. v. Hoover Distilling Co.*, 173 Fed. Rep. 888; 32 L. R. A. (N. S.) 940 and *Scruggs v. American Central Ins. Co.*, 176 Fed. Rep. 224, 36 L. R. A. (N. S.) 92. Neither of these cases is parallel to the instant case. In both of them it was sought to restrain the assured from maintaining separate



suits at law against each of the several insurance companies which had issued policies covering the property insured and in both the cases the court held that such action would not lie. This is not a suit brought by the insurance companies here involved or either one of them, but is a suit brought by the assured and parties interested with it in the property insured, which is a distinction that seems to have been recognized by the courts in cases of this nature. In the case of *Mechanics' Insurance Co. v. Hoover*, supra, it appears that the Distilling Company suffered a loss of property by fire on which there were insurance policies to the amount of \$85,500.00 distributed among some fifteen or more insurance companies. The distilling company commenced separate actions at law against each of such insurance companies, and suit was brought in equity to restrain the distilling company from prosecuting such separate actions at law. The trial court sustained a demurrer to the bill for want of equity and dismissed the suit. This judgment was affirmed by the United States Circuit Court of Appeals for the Eighth District. The Federal Court in its opinion used the following language: "There can be no claim that any complainant is saved from a multiplicity of suits by the maintenance of this action in equity. The Distilling Company is not in court asking it to take jurisdiction of its suits against the insurance companies in order to save the Distilling Company from a multiplicity of suits against it or by it. It does not rest with the complainants to urge as a foundation for their suit that the defendant, The Distilling Company, may thereby be saved a multiplicity of suits." In the case of *Scruggs v. American Central Ins. Co.*, supra, the insured also brought separate suits on each of the several insurance policies covering property which had been destroyed by fire and suit in equity was then brought to restrain the prosecution of these separate suits. A demurrer to the bill was overruled. On appeal to the U. S. Circuit Court of Appeals the decree was reversed with directions to sustain the demurrer. In its opinion in that case the Federal Court used the following language: "It does not rest with the complainant to urge as a foundation for its suit that the defendants may thereby be saved a multiplicity of suits." This question has been passed upon by the Appellate Court of the Third District of this state in the case of *Smith v. Allemannia Fire Insurance Co.*, 219 Ill. App. 506. In that case Smith, the assured, filed a bill to recover on 17 fire insurance policies issued to him by 17 companies, all of which were made defendants. A judgment was entered by the trial court against the insurance companies. On an appeal to the Appellate Court of the Third District the insurance companies contended that a court of equity was without jurisdiction to try the cause and that the bill should have been dismissed. On the other hand the assured contended that a court of equity had jurisdiction for the purpose of preventing a multiplicity of suits and to apportion the amount of the loss among the several companies. The court after reviewing the authorities held that the Chancellor before whom the case was tried did not err in assuming jurisdiction of the case, and further said, "this case is to be carefully distinguished, however, from a suit sought to be maintained by insurance companies to enjoin the insured from maintain-





ing actions at law. In such cases equity does not have jurisdiction." It would therefore seem that the test to be applied to this question is whether or not the complainant in the suit in equity is saved a multiplicity of suits. Such seems to be the holding not only of the Appellate Court of the Third District, but of the Federal courts in the cases cited by appellants. Here the complainants are saved a multiplicity of suits by this action in equity. The subject matter and the questions involved are the same. We are therefore of the opinion that the Chancellor did not err in assuming jurisdiction of this cause, and that there is no misjoinder of parties complainant or defendant.

The next question raised by appellants is that even if the Chancellor did properly assume jurisdiction of the cause he erred in reforming the policies sued upon. It is conceded as stated by appellants that in order to justify the reformation of the policies three things were necessary: (1) The mistake should have been one of fact and not of law; (2) It should be proved by clear and convincing evidence, and (3) should be mutual and common to both parties to the instrument. As to whether the trial court erred in reforming the policies so as to make the mortgage clauses a part thereof instead of the loss payable clause, must be determined from the evidence in this case. H. W. Faulkner, President of H. W. Faulkner & Co., who negotiated for the different insurance policies, testified positively that he directed that the mortgage clause be attached to each of the policies, and that he never saw the policies after they were issued and did not know until after the fire that the loss payable clause had been attached instead of the mortgage clauses. Rufus Grant, the agent through whom the policies of the National Liberty Ins. Co. and the Agricultural Ins. Co. of \$100,000.00 each were negotiated, testified that when Faulkner contracted for the insurance he asked that the mortgage clause be attached; that some months elapsed between the time he asked for the insurance and the issuance of the policies, but that during said time the insurance was in force by virtue of the companies issuing what it referred to as binders, but that he did not show either the binders or the policies to Mr. Faulkner, but turned the policies when they came, over to W. S. Partridge, acting secretary of the Mt. Vernon Loan and Building Association. Grant further testified that he did not attach the mortgage clauses but that he told Mr. Faulkner they would be attached, and that he did not know until after the fire that they had not been attached. This agent further testified that Faulkner gave him an order or directions to attach a mortgage clause in favor of the trustee under the second mortgage and the chattel mortgage; that he knew of the giving of the chattel mortgage; that he informed Faulkner that such mortgage clause would be attached, and that he did not know until after the fire that they had not been attached. W. A. Wilkerson, assistant cashier of the Third National Bank, testified in behalf of appellees that on the occasion of the execution of the second mortgage and the chattel mortgage, he heard the attorney for Faulkner tell the agent Grant to put the mortgage clause on the policies, and that the agent replied "he would." This witness also testified that about two weeks after the fire he was



present at a conversation between Mr. Faulkner and P. W. Morgan the agent for the Milwaukee Mechanics' Insurance Company; that they went there to inquire about this policy of this company, which couldn't be found. He stated that on the second Sunday after the fire Faulkner inquired of the agent Morgan if such policy had the mortgage clauses attached, and that Morgan replied, "he didn't know," but he thought it did for there was to be one, and that he would write the company about it. Another witness, a clerk of H. W. Faulkner & Company, testified that she got from the safe a copy of this second mortgage and the chattel mortgage for H. W. Faulkner on an occasion when the agent P. W. Morgan was at the plant. H. W. Faulkner testified also that on this occasion he showed to the agent P. W. Morgan, a copy of the chattel mortgage and the second real estate mortgage. The agent, Paul W. Morgan, through whom this policy was negotiated, denied that at the time the policy was issued anything was said about the attachment of mortgage clauses. He further testified that he knew nothing of the execution of the second mortgage or the chattel mortgage, and that the same were never called to his attention. This witness also denied the conversation with Faulkner and the witness Wilkerson on the second Sunday after the fire concerning the mortgage clauses, but stated that they simply inquired for the policy which had been lost.

Under this condition of the proof we cannot hold that the finding of the chancellor who heard these witnesses testify and saw their demeanor on the stand is contrary to the manifest weight of the evidence. In our opinion the clear preponderance of the evidence is to the effect that at the time these different policies were executed or contracted for it was the understanding of both the assured and of the agents that the mortgage clauses should be attached, and that, therefore, the contract of insurance which was executed was not the contract intended by the parties to be entered into and that the court did not err in ordering this reformation.

Each of the policies of insurance mentioned in the bill of complaint contained the following provision: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the subject of insurance be personal property and be or become encumbered by a chattel mortgage." A portion of the property included in the policies was personal property, and was at the time of the fire in question, subject to a chattel mortgage. There was no endorsement on the policies or either of them, consenting to said chattel mortgage and appellants therefore contend, that in the absence of knowledge on their part of the existence of said mortgage, which they say was the case here, said condition of forfeiture was not waived and said policies became void. Appellants correctly state the rule upon this subject to be that a breach of a condition in a fire insurance policy against the property being encumbered by a chattel mortgage will bar a recovery upon the policy where there is no waiver or estoppel which precludes the company from relying upon the contract. (*Crikelair v. Citizens Ins. Co.* 168 Ill. 309). In answer to this contention appellees insist that the appellants through their agents knew of the existence of the chattel mortgage and by





apparently continuing the policies in force thereafter, waived the right of forfeiture, if they ever had such right. It is, however, claimed by appellants that even if their agents had notice of the chattel mortgage they did not acquire such notice as agents of appellants; that Grant acquired the same as cashier of his bank, whose interest is opposed to that of appellants, and that the agent, Morgan, acquired the same as a stockholder of H. W. Faulkner & Company whose interest is also opposed to that of appellants. This contention does not appear to us to be tenable under the law as applied to the proofs in the record. In a case where the agent of an insurance company was cashier and joint owner of a bank which carried a mortgage upon the property insured this court held, that the interest of the agent was not so opposed to the interest of the insurance company, or so conflicting with it, that notice to him as agent would not be binding upon the company. *Storment v. Hartford Fire Ins. Co.*, 215 Ill. App 287. So in this case it does not appear from anything in the evidence that the interest of either of the agents is so opposed to the interest of his principal that notice to the agent would not be binding upon the company or companies represented by him. We must therefore hold that notice to these agents of the existence of the chattel mortgage was notice to the insurance companies, and that they are therefore estopped from seeking a forfeiture of the policy because of the existence of such chattel mortgage.

The property insured for H. W. Faulkner & Company was described in the policies as the automatic sprinkler equipped buildings of their factory plant and the contents of said buildings situated on certain lots named. It is claimed by appellants that this description could not have included the boiler room as it was not equipped with a sprinkler system. The Chancellor however permitted the policies to be reformed so as to more definitely designate the boiler room as a part of the property insured. We think the evidence shows that it was the intention of all the parties at the time these insurance policies were written that the boiler room and its contents should be covered. A report made to the Western Sprinkler Association by an inspector, dated July 31, 1920, which was introduced in evidence contains the following statements: "Risk is contained in a four story and basement, brick, open joisted building with one story brick, open joisted boiler room detached about 10 feet. The entire risk with the exception of boiler room is protected with a two source sprinkler equipment with water supplies from city main and gravity tank." . . . "Location of values—Approximately 95 per cent of values in factory and 5 per cent in boiler room." . . . "Detached boiler room unsprinkled." . . . "Parts sprinkled—All parts except boiler room, which is detached ten feet from main building." In view of all the proof on the subject the Chancellor did not err in permitting the policies to be reformed so as to more definitely include the boiler house.

The insurance policies provided that when the factory building was not open for business the assured should provide a watchman. Appellants contend that the fire occurred at a time when the factory was not open for business and that no watchman was on duty. There does not appear to have been



any violation of the provision of the policies as the evidence shows that H. W. Faulkner and other persons were in the building when the fire started, which was at about 4 o'clock p. m., and Faulkner testified that they were there for the transaction of business. The policies also provided that the assured should use all due diligence in keeping the sprinkler system in working order. Appellants contend that the evidence shows the sprinkler system was not in working order at the time of the fire. A number of witnesses testified in behalf of appellants that they did not hear the gong with which the sprinkler system was equipped sounded during the fire. A greater number of witnesses testified in behalf of appellees that they did hear the gong. There is in the record evidence to the effect that the gong would not have sounded if the sprinkler system had not been working. The proof also shows that the sprinkler system was duly inspected a short time before the fire and reported to be in good condition. This evidence fully sustains the finding by the Chancellor that the sprinkler system was in good working order at the time of the fire.

In regard to the amount of the loss occasioned by the fire, there was some controversy between the parties and in the proof. It appeared from the evidence that in July prior to the fire which occurred on August 6, Faulkner & Company in the course of their business procured an appraisal of their buildings and another covering their machinery, furniture and plant equipment to be made by the Lloyd Appraisal Company of Chicago. The reports made by the appraisal company were offered in evidence by appellees and admitted. Appellants aver that the Chancellor erred in admitting these reports but it appears that the employees of the Appraisal Company testified to the correctness of their appraisal and there was also the testimony of other witnesses introduced by appellees to the same effect. We are therefore of the opinion that the appraisals were properly admitted in evidence. The proof as a whole clearly sustained the finding of the Chancellor as to the several items of loss, amounting in the aggregate to \$223,755.50, which sum, together with interest at the rate of 5 per cent per annum from the time provided by the policy for the payment of any loss, was allowed appellants by the decree.

We conclude from a careful consideration of the record in this case, that the decree of the chancellor herein should be and it accordingly is, affirmed.

DECREE AFFIRMED.

Not to be reported in full.





Term No. 4

Agenda No. 1

IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

OCTOBER TERM, A. D. 1922

GEORGE C. SMITH,  
Appellant.

v.

THE ANNA MUTUAL RELIEF  
ASSOCIATION,  
Appellee.

Appeal from the  
Circuit Court of  
Union County.

Opinion by BOGGS, P. J.

An action in assumpsit was brought by appellee in the Circuit Court of Union County, to recover on two Benefit Certificates, one for Five Hundred Dollars and the other for One Thousand Dollars, issued by appellee on the life of Ernest Smith, now deceased. The declaration consists of two counts in the usual form, where an action is grounded on a Benefit Certificate. To said declaration appellant filed a plea of the general issue and three special pleas. The first special plea charges that the insured was not a member of the association at the time of his death. The second special plea, sometimes called, "Special Additional Plea 'A'," alleges that during said membership the following by-law was in effect:

"The secretary shall, upon complaint being filed by at least two members charging any member with violation of any of the rules or by-laws of this association, or indulging in any of the habits or practices prohibited by the by-laws, shall immediately notify the president, who shall immediately after such notice call a meeting of the officers of the association, not later than five days, and the secretary shall upon notice of such call, notify the accused of the nature of such charge, and the time and place of such meeting where he may appear and answer to such charge. Upon such charge being sustained the accused may be suspended for a definite length of time, or, upon a majority vote of the officers present, shall be expelled. Any member may be expelled for gross immorality, or for a conviction under the laws of the state for a felony, or for indulging in any useless habits or exposures that may materially shorten or endanger his life, or for wilfully violating the by-laws or regulations of this association."

Said plea further avers among other things that said insured was guilty of gross immorality in that on July 5th, 1919, without provocation and with malice aforethought, he killed and murdered one Charles M. Flanigan, a member in good



standing in said association; that on August 4th, 1919, two members of said association, filed with the secretary a complaint charging that said insured killed and murdered Charles M. Flanagan, and that he now stands indicted on a charge of murder by a grand jury of said county; said plea further alleges that upon the filing of said charge the secretary notified the president, who proceeded to call a meeting of the officers of said association, and that said secretary cause a notice of said charge to be personally served on the insured, which said notice designated the time and place when and where the said charge would be heard.

Said plea also avers that the assured failing to appear at the time and place designated the officers of said association proceeded to hear said charge, and after "an investigation and consideration" of said charge, they found said assured did, without provocation, kill and murder Charles M. Flanagan, and thereby wilfully violated the by-laws and regulations of the association. That it was then ordered by the said officers that the said assured be removed and expelled from the association and that he was so removed and expelled, so that he was not at the time of his death a member thereof.

The third special plea was to the effect that the said Ernest Smith was not a member of the association on the 14th day of August, 1919, and that the said certificate had lapsed and become null and void.

A general and special demurrer was filed to each of said special pleas and was overruled by the said Court. Appellant having elected to stand by his demurrer to said Special Pleas, judgment was entered thereon against him in bar of action and for costs. To reverse said judgment appellant prosecutes this appeal.

It is contended by counsel for appellant that the trial Court erred in overruling the demurrer to said Special Pleas. The first and third Special Pleas were bad on special demurrer for the reason that they plead conclusions and not facts. The demurrer thereto should have been sustained and the Court erred in its rulings thereon.

The real controversy in this case, however, arises on the ruling of the Court holding appellee's second or "Special Additional Plea 'A'" sufficient.

It is the contention of counsel for appellant that the allegation in said plea, "that the insured without any provocation and with malice aforethought did kill and murder Charles M. Flannigan" and now stands indicted on a charge of murder is not sufficient answer to the declaration under the provision of the by-laws for the expulsion of a member for "gross immorality" nor under provision for expulsion "on conviction for a felony."

We are of the opinion and hold that the finding by the officers of appellee association "after an investigation and consideration of said charge" that the assured had been guilty of murder, was not sufficient on which to base an order of expulsion, under said provision in reference to expelling a member upon conviction of a felony, under the laws of this state, for the reason that the conviction there referred to is one where a trial has been held as contemplated by the Constitu-





tion and laws of the State, and a conviction has regularly followed.

On the question as to whether the allegations of said "Special Additional Plea 'A'" constitutes "gross immorality," as that term is used in said Section Four of the by-laws, is a matter of more serious doubt.

Policies of insurance and Benefit Certificates are to be liberally construed in favor of the assured. *Royal Circle v. Achterrath*, 204 Ill. 549; *Am. and Eng. Ency. of Law*, Vol. XIX 2nd ed. page 80; *Cyc.* Vol. XXIX page 67.

In *Royal Circle v. Achterrath*, *Supra*, the Court in discussing this question at page 560, says: "One of the rules of construction is that such contracts (benefit certificates) are to be liberally construed in favor of the insured. In *National Bank v. Insurance Co.* 95 U. S. 673, it was said that 'The policy having been prepared by the insurers, it should be construed most strongly against them.' In *Thompson v. Insurance Co.*, 136 U. S. 297, it was said, 'If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured.' See also, *Massachusetts Life Ass. v. Robinson*, 104 Ga. 277."

Immorality is refined by Webster as "the quality of being immoral; an immoral act or practice; inconsistent with rectitude; contrary to conscience or the divine law; wicked, unjust, dishonest, vicious, depraved, impure, unchaste, profligate, dissolute, abandoned, licentious, lewd, obscene, debauched." Ordinarily immorality is considered with having to do with the moral attitude of a person in reference to the sexual relations.

While all will concede that the crime of murder is one of the most serious crimes that can be charged against a person, at the same time it does not necessarily follow that that crime is one, which in the common acceptation of the term is ordinarily classed as "grossly immoral." It should be observed too, in this connection that appellee association evidently intended to make separate classifications of felonies and acts or conduct that is "grossly immoral."

The language of Sec. 4 of said By-Laws being "any member may be expelled for gross immorality, or for a conviction under the laws of the State for a felony."

It must be borne in mind, too, in passing on this case that when a certificate of membership is issued to a member, his certificate is evidence of his good standing at the time of its issue, and such good standing will be presumed to continue until there is proof that it no longer exists. *High Court, etc., v. Zak*, 136 Ill. 185.

The law further is, that where property rights are involved the courts have power to examine the proceedings of beneficiary associations for the purpose of determining whether the action taken is in essential compliance with the laws of the order. *Modern Woodmen of America v. Deters*, 65 App. 368; 29 *Cyc.*, 201; *Ryan v. Cuhahay*, 157 Ill. 108.

It is said by the author in 16 *Am. and Eng. Ency. of Law*, Sec. 82, 83, that where a forfeiture is claimed under the by-laws, and proceedings under their provisions are had, they must appear reasonable, and be in strict accordance with such by-



laws, and upon due notice to the accused, and an opportunity on his part to defend and explain his conduct.

We are of the opinion therefore, and so hold that appellee association was not warranted in ordering the expulsion of the insured from membership in its association and that the order attempting so to do was therefore null and void.

This being the state of the record, we are of the opinion and so hold under the rules above set forth with reference to the attitude that the courts should assume in construing insurance policies or Benefit Certificates that are drawn by the insurer, that the charge of murder should not be in this case construed as "grossly immoral."

Other grounds of error were assigned and argued by counsel for appellants, but in view of what we have already said it will not be necessary to discuss them.

For the reasons above set forth the judgment of the trial Court will be reversed and the cause will be remanded.

Reversed and Remanded.





(3178a)

IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

FRED NOBS.

Plaintiff in Error.

vs.

PETER AEBEL AND NORA  
AEBEL,

Defendants in Error.

Habeas Corpus.

Writ of Error to the Madison County Circuit Court.

Opinion by BOGGS, P. J.

The Plaintiff in Error, Fred Nobs, hereinafter called petitioner, filed a petition in the Circuit Court of Madison County at the May Term, 1922, praying for a writ of Habeas Corpus, for the purpose of obtaining the custody and control of his daughter, Evelyn Nobs, aged seven years, and making Peter Aebel and Nora Aebel respondents thereto. The said Peter Aebel being the grandfather of the said Evelyn Nobs, and the said Nora Aebel being the second wife of the said Peter Aebel, and of no blood relation to the said Evelyn Nobs.

To this petition respondents filed a return setting forth among other things that Anna Nobs, the mother of said child, and the daughter of said respondent Peter Aebel, by a former marriage, died about June, 1918; that immediately after the death of the mother, the petitioner gave the care, custody, education and control of said child to the respondents, and that she has remained in their custody ever since; that said petitioner is a widower and resides alone; that since the death of her said mother, the said Evelyn Nobs has been destitute and dependent upon the respondents for support; that the petitioner, since the death of his wife, has failed to provide his child a suitable home, except by delivering her into the care of the respondents; and that a petition had been filed in the County Court to have the said Evelyn Nobs declared a dependent child, a copy of which said petition was attached to and made a part of said return.

Petitioner filed a traverse to said return denying that he gave the custody and control of his child to the respondents, but charges that they came to his home and asked to take said child for a time, and continued to keep her; that petitioner paid the respondents for the board of said child and



bought her school books and clothing when needed; denies that said child is destitute and dependent; denies that he has not shown proper parental care and affection for his daughter, and prays for an order of Court giving to him her custody and control.

A hearing was had in said Circuit Court and an order was entered dismissing said petition and remanding said child to the custody and control of the respondents. To reverse said order or judgment this Writ of Error is prosecuted.

The record discloses that petitioner married a daughter of the said Peter Aebel, about the year 1914, and of this marriage there was born the one child, Evelyn Nobbs. On June 27, 1918, when the said Evelyn Nobbs was about three years old, her mother died, and some four or five months thereafter she was taken to the home of the respondents and has resided therein up to the time of said hearing.

The record further discloses that while petitioner is not a man of large financial means, he has several horses and mules, and farming machinery sufficient with which to farm something like 100 or 120 acres of land; that he has about \$600.00 in the bank and has something like \$600.00 or \$800.00 loaned out, \$240.00 of which amount is loaned to the respondent Peter Aebel, and for which he holds respondent's note.

The record also discloses that the petitioner did not for the present expect to take his child to his home, if her custody was awarded him by the court, but had made arrangements with a Mr. and Mrs. Dippold, who lived in the same neighborhood, to take said child into their home to board. The record further discloses that Mr. and Mrs. Dippold are respectively 31 and 28 years of age, are people of good moral character, have no children of their own and are ready and willing to take Evelyn Nobbs and board her for \$8.00 per month, that being the price agreed on between them and the petitioner. They have a comfortable home located one-half mile from the public school.

The record shows petitioner to be a man of good moral character, of good habits, with a parent's affection for his child, and in every way a proper person to have the care and custody of his child, except that he is living alone. The record, however, shows that the home in which petitioner has arranged for his child to board is one in which she will be properly cared for and where the father will feel free to visit at any time.

It might be further observed that the only charge made by the respondents against petitioner on the hearing was that he was too much given to making and saving of money, and was not in a position to properly care for said child, for the reason that he had no housekeeper and did not keep his home up in the best condition.

The respondent Peter Aebel owns and operates a dance hall, and while the evidence tends to show that he and his wife are persons of good moral character and of ample means to provide a home for petitioner's child, still the record further shows that an estrangement has grown up between the petitioner and respondents of such a character that he does not feel welcome to go to their home for the purpose of visiting his child. This estrangement seemed to have been caused in





part at least on account of the amount of compensation that petitioner should pay for the care of said child, and as to the amount already paid. Petitioner testified that he had paid in the four years that she was with the respondents, something like \$200.00. While the respondents claimed he had only paid about \$75.00.

The child was examined by the trial judge without being sworn and stated that while she loved her father, she preferred to live with the respondents; that she should so feel can be easily understood in view of the fact that she went to their home when she was only about three years of age.

In determining the question of the correctness of the Court's ruling in this case, it is well to bear in mind some of the fundamental principles governing questions of this character. The law is, "That the right of a parent is superior to those of any other person when that parent is a fit person to have the custody of children and is so circumstanced that he can provide the necessities of life and administer the requirements of such a charge."

Cormack v. Marshall, 211 Ill. 519-523; Sullivan v. The People, 224 Ill. 468-476; Hohenadel v. Stelle, 237 Ill. 229-234; Wholford v. Burckhardt, 141 App. 321-325; Harmon v. Starbody, 219 App. 603-605.

Section 4, of Chapter 64, Cahill's Revised Statute provides: "That the parents of a minor, if living, and in case of the death of either of the parents, the surviving parents, they being respectively competent to transact their own business and fit persons shall be entitled to the custody of the person of the minor and the direction of his education."

In Wohlford v. Bruckhardt, Supra, the Court at page 325, says:

"Unless the evidence is clear that the parent of the child is unfit to care for it, the father should have the custody. The mere fact that other relatives or persons might give better care, and spend more time and money upon the child, is no reason for depriving the father of its custody. It is not a question of relative ability of the parents, but is the sole question of whether the father is able and will give the child good care and treatment. The Court is only warranted in depriving the father of the custody of the child when the evidence discloses that the child, on his account, is destitute, abandoned or dependent, or that he is living an immoral life or is in vicious or disreputable surroundings, or that he neglects or treats the child unkindly or cruelly, or may do this, or is wanting in good principles, or is illy adapted to the care of the child on account of defects in his mental or physical qualities, which prevent him from being a kind and affectionate father."

And in Sullivan v. People, Supra, the Court at page 477 says: "The law charges the father with the maintenance of his child, and the legal presumption in the absence of all proof, is that he is entitled to its care and custody. The right is not an absolute one, and it may be divested by the paramount power of the State for good and sufficient cause.

The father may by his misconduct forfeit his right, (10 Am. & Eng. Ency. of Law, 2d ed. 1038); but proof of the facts which show such forfeiture, or that he is unfit to perform the



duties or obligations resting upon him, is upon the one who alleges them."

The evidence in the record wholly fails to sustain the allegations of respondents' return to the petition and in view of the law as laid down in the authorities cited, we are of the opinion and so hold that the petitioner should have been awarded the custody of his child and the Court erred in denying his petition, and in remanding her custody to the respondents.

Counsel for respondents contend that the traverse and denial of petitioner to the return and answer of respondents was not sworn to as required by Statute, and that the trial Court erred in not striking the same from the files on respondents' motion. Respondents failed to assign cross errors and are therefore not in a position to have the ruling complained of reviewed by this Court. *Hollingsworth v. Koon*, 117 Ill. 511; *People v. Brislin*, 80 Ill. 423.

For the reasons above set forth the judgment of the trial Court will be reversed and the cause will be remanded for further proceedings in harmony with the foregoing opinion.

Reversed and Remanded.

Not to be reported.





IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

MARCH TERM, A. D. 1923

FILED

APR 20 1923

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

THE PEOPLE, Ex Rel. CARRIE  
POOL,

Appellee.

vs.

WILLIAM POLLEN,

Appellant.

Appeal from the  
Probate Court,  
Richland County,  
October Term,  
A. D. 1922.

Opinion by BOGGS, P. J.

On August 26th, Carrie Pool, the prosecuting witness, filed a complaint before a Justice of the Peace of Richland County, charging appellant with being the father of her bastard child. A trial was had in the County Court of said county resulting in a verdict finding appellant guilty. A motion made by appellant for a new trial was overruled by the Court, and judgment was rendered on the verdict. To reverse said judgment this appeal is prosecuted.

The record discloses that in the Autumn of 1919, the prosecuting witness, a single woman of about 25 years of age, entered the home of one Elmer Summers near Moroa, Illinois, as a domestic and continued therein as such until about the month of October, 1920, when she returned to her home in Richland County, where she resided up until the time of said trial. The child in question was born November 19, 1920.

It is first contended by appellant for a reversal of said judgment that the record fails to disclose where said child was born and that this is necessary in order to give the court jurisdiction. While the prosecuting witness did not definitely state that her child was born in Richland County, at the same time she testified that she left the home of the Summers' on October 17, 1920, and went to her home in Richland County and remained there ever since. The jury were therefore warranted in finding that said child was born in Richland County.

It is also contended that the court erred in giving the second, third, fourth and fifth instructions given on behalf of appellee. The second instruction is as follows: "You are instructed as a matter of law, that although you may believe from the evidence that the prosecuting witness had sexual intercourse with other persons about or near the time her bastard child might have been begotten, still such fact would not warrant the jury in finding the defendant not guilty, if you believe from a preponderance of all the evidence in the



case that the defendant is the father of such bastard child." While this instruction is somewhat loosely drawn, at the same time it states a correct principal of law and the court did not err in giving the same.

It is contended that the third instruction is erroneous in that it singles out appellant as a witness and directs special attention to his testimony. This is not a proceeding where one individual is suing another. If it were then the contention of counsel for appellant would be correct. This is a proceeding brought by The People on relation of the prosecuting witness against the appellant, and in cases of that character, it is not error to call the attention of the jury to the interest of the defendant if he should testify as a witness.

In *People ex rel. v. Bibb*, 155 App. 371, this court at page 375 in discussing this question (being a bastardy proceeding) says: "The second ground assigned for a reversal of the judgment, that the second instruction of appellee is erroneous because it directs the jury's attention 'to the interest of the defendant without making any reference to the interest of the plaintiff' is untenable. As said by our Supreme Court in *C. & E. I. R. R. Co. v. Burrige*, 211 Ill. 13, had the suit been between two natural persons 'and had both plaintiff and defendant testified, this objection would be good.'"

In such case on instruction of this character should be so drawn as that it would apply to either party to the suit without pointing out either. In this case the complaining witness is not a party to the suit, and the rule does not apply. While this prosecuting witness is interested in the suit, as all others, are more or less, in any suit, yet she is not a party, plaintiff, as the suit is in the name of the People. In cases of prosecutions in the name of the People, such an instruction is proper. (*Henry v. People*, 198 Ill. 194; *Dunn v. People*, 109 Ill. 642.) In view of the holding of this court in that case the court did not err in giving said instruction.

It might also be observed that the 12th instruction given on behalf of appellant specifically directs the attention of the jury to the testimony of the prosecuting witness, without mentioning appellant. Appellant having procured the giving of an instruction of the same character as the one complained of, he is therefore not in a position to urge that the court erred in giving the same.

The fourth and fifth instructions complained of are with reference to the credit to be given to the different witnesses testifying in the case. We have examined these instructions in connection with the criticism made and we find that they are not subject to the same, and that they state correct principles of law. The court did not err in giving said instructions.

It is next contended by the appellant that the verdict of the jury is against the manifest weight of the evidence. The prosecuting witness testified that appellant had sexual intercourse with her at the Summer's home on March 1st, 1920, and that she became pregnant at that time. She further testified that at a later period he also had sexual intercourse with her. On cross examination she stated that her last monthly sickness was about the 1st of March, 1920, at that time she had intercourse with appellant. On the other hand, appellant testified, "I absolutely did not have sexual intercourse with Miss Pool on Mar. 1st or a few days later or at any time in the month of February or March, 1920. I was not even on the farm. Not working there. I am not the father of this bastard child." On cross examination, however, he testified that "he was





working for P. M. Smallwood. He had a sale on March 2, 1920, and I was on the farm then caring for his stock; was not there on March 1st; also helped at the sale; was boarding with Mrs. Hartriders from March 1st to March 4th. Was not on the Summers farm after March 3rd."

P. M. Smallwood, a witness on behalf of appellant also testified that appellant was working for him on the Summers farm at that time taking care of his stock.

Appellant undertook to impeach the prosecuting witness by showing that she had made a statement on one occasion to the effect that appellant was not the father of her child and that on another occasion she had made a statement that Summers was its father. The prosecuting witness denied having made either of these statements.

It was also sought to be shown by appellant that the prosecuting witness had had intercourse with one A. E. Henson, who was working on the Summers farm. She was asked if she did not leave her room and go to Henson's bed. This she denied. Henson testified on behalf of appellant that the prosecuting witness had come to his bed while he was working at Summers'. On cross examination it developed that this was in November or December, 1919, some two or three months prior to the time the prosecuting witness testified that she had become pregnant.

It will therefore be seen there was a sharp conflict in the evidence. This being so, it was for the jury to say what the evidence proved and as we are not prepared to say that their verdict is against the manifest weight of the evidence, we would not be warranted in granting a new trial for that reason.

Appellant tried the case on the theory that the prosecuting witness had sexual intercourse with Henson and also with appellant's brother, and inferentially with appellant, but not during the months of March and April. In one of the instructions offered by appellant and which was given to the jury, the court states to the jury that if they believe from a preponderance of the evidence that the prosecutrix became pregnant and conceived said bastard child at some time prior to April first, 1920, and that appellant did not have sexual intercourse with her prior to that date, then in that state of the proof, it was their duty to find appellant not guilty.

It was also strenuously contended by appellant that reversible error was committed in that the States Attorney in his closing argument stated to the jury as a reason why the complaint which was filed some 20 months after the birth of said child had not been filed before, was "because her father had been taken to the insane asylum and this poor girl, who is a defective, did not know her rights and the supervisor of the township in which she lives, advised her to come up here and file this complaint." We would be inclined to hold that these remarks not being founded on the record would be reversible error if it were not for the fact that counsel for appellant in his argument had specifically called on the States Attorney to state why they had delayed so long in filing said complaint. We hold, therefore, that the remarks of the States Attorney being provoked by counsel for appellant we would not be justified in reversing the judgment on account of said remarks. *Illinois Central R. R. Co. v. Bee*, 69 App. 363-388.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment Affirmed.

Not to be reported.



IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

MARCH TERM, A. D. 1923

FILED

APR 30 1923

Attest: P. J. Boggs  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

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Appellee.

vs.

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Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment Affirmed.

Not to be reported.





IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

MARCH TERM, A. D. 1923

STOTLAR-HERRIN LUMBER  
COMPANY,

Appellee.

vs.

LOUIS LOSS,

Appellant.

12345 12345 123456666

Appeal from the  
City Court of  
Johnson City,  
Illinois.

FILED

APR 20 1923

Robert H. [Signature]  
Clerk of the Court  
FOURTH DISTRICT OF ILLINOIS

Opinion by BOGGS, P. J.

A bill was filed by appellee in the City Court of Johnson City, to enforce a Mechanic's Lien against appellant for the sum of \$69.75. The bill alleges: That on Sept. 12th, 1921, one Louis Loss, appellant herein, was erecting a store building and contracted with appellee for the sale and delivery to him of lumber, cement and other building materials, to be used in the construction of said building then to be erected on premises described in said bill. Said bill further alleges that no particular amount of lumber or other materials was specifically contracted for nor the kind and quality specifically mentioned, and that the time of delivery, while not definitely fixed, it was understood and agreed between appellee and appellant that appellee should furnish and deliver such quantities of lumber and materials as appellant might need in and about the construction of said building, and that building was to be completed on or before Sept. 30, 1921.

Said bill further avers that beginning on the 12th day of September, 1921, and continuing until the 29th day of September, 1921, he furnished materials as set forth in an exhibit attached to said bill, in total amount, after deducting credits, of \$69.75, prays for Mechanic's lien, etc.

To said bill appellant filed an answer denying that he made any agreement with appellee for the purchase of lumber and other materials and denies that any part of the materials for which a lien was sought were used in and about the construction of said building.

Evidence was taken and a hearing had in open court. The Court found the Equities of said cause for appellee and a decree was entered finding that there was due appellee, the sum of \$69.75, and that he was entitled to a Mechanic's Lien therefor. To reverse said judgment and decree this appeal is prosecuted.

It is first contended by appellant for a reversal of said



decree that the evidence wholly fails to support the allegations of said bill. The only evidence in the record with reference to the furnishing of said materials was testified to by Ben Perrine, the manager of appellee lumber company. This witness testified that the materials mentioned in the exhibit to complainant's bill aggregating the amount of \$69.75, after allowing the credits thereon were furnished by appellee to appellant. This witness also testified that he had no conversation or agreement in reference thereto, with appellant; that he did not know whether the lumber and materials alleged to have been furnished were delivered on the premises of appellant where his building was being constructed or as to whether said materials went into said building. He testified in reference thereto, "I did not know when these items were sold that they were just on the job. J. C. Robinson, foreman on said building, was the one who came to see about them. I do not know where this particular stuff went and I cannot state as to what job the stuff went.

I never saw Mr. Loss with reference to selling this stuff (the stuff mentioned in the exhibit). The original was credited to Duffner & Stecher, contractors, Louis Loss owner. \* \* \* I do not know whether it went to this particular piece of property or not. It was just an open account."

While said witness testified that Robinson was appellant's foreman, he does not state that Robinson purchased the goods in question. In fact there is no evidence in the record to the effect that the goods for which a lien is sought were purchased by anyone on behalf of appellant. Mark Ferges, the Manager of the East Side Lumber Company testified on behalf of appellee that appellant had made arrangement with his company to furnish the necessary materials for his building, and that when they did not have the materials needed they sometimes procured the same from the Johnson City Lumber Company, and sometimes from appellee company, but whenever they did so procure lumber or materials they paid for the same.

The evidence on part of appellant is to the effect that he never purchased any materials from appellee company and that he never authorized anyone else to purchase said materials for him, and that none of the materials in question were ever delivered to, or went into the building which he was constructing. Appellant further testified that he had made arrangements with the East Side Lumber Company to furnish all the materials that he might need on said building. He stated that Robinson was his foreman, but that he was never authorized or directed to purchase any materials from appellee company.

We therefore hold that appellee has failed to prove the allegations of his bill. Mechanic's liens were not recognized at common law and exist only by virtue of statutes, creating them and providing a method for their enforcement. Such statutes must be strictly construed with reference to all requirements upon which the right to a lien depends. *Turnes v. Brenckle*, 249 Ill. 394; *Cronin v. Tatage*, 281 Ill. 336; *Essendath v. Gebhardt*, 222 Ill. 113.

The foundation of the right to a mechanic's lien, is a valid contract with the owner of the lot or tract of land to be





improved, or with his duly authorized agent, for the construction of an improvement thereon and the furnishing of materials and labor pursuant to the provisions of such contract. The lien is not created by the contract of the parties, but is created by statute. Still a contract, express or implied, is essential to the creation of any valid lien under the statute. *Rittenhouse v. Warren*, 264 Ill. 619-624; *Walsh v. Murphy*, 167 Ill. 228.

The law further is that the lumber or materials furnished must be for some particular piece of property. It cannot be on an open account if a Mechanic's Lien is to be given to enforce payment for the same.

*Hill, et al. v. Bishop*, et al. 25 Ill. 349; *Croskey et al. v. Corey*, et al. 48 Ill. 442; *Dymond, Admr. etc. v. Bruhns*, et al. 101 Ill. App. 425-431.

The evidence on the part of appellee in this case discloses that this lumber and material were furnished on an open account and no sufficient proof was made that the same was used in the building in question.

In *Hill v. Bishop*, 25 Ill. Supra, the Court at page 350 says, "This petition is manifestly insufficient. It shows that the lumber was furnished upon an open general account, and without reference to its being put into any particular building, or even that it should be used in any building. It would have been no violation of the agreement to purchase it, if the material bought had been used in making furniture or any other personal property. Under our statute, no lien could be created upon any premises by such a purchase of lumber."

In view of the foregoing authorities, we are of the opinion and so hold that the evidence in the record wholly fails to sustain the allegations of appellee's bill, and that the Court erred in not dismissing said bill for want of equity. For the reasons above set forth the judgment and decree of the trial Court will be reversed and the cause will be remanded with direction to dismiss said bill for want of equity.

Reversed and Remanded with Directions.

Not to be reported.



Term No. 17

Agenda No. 7

IN THE  
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FOURTH DISTRICT

MARCH TERM, A. D. 1923

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FILED

APR 20 1923

Robert B. [Signature]  
CLERK OF THE APPELLATE COURT  
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improved, or with his duly authorized agent, for the construction of an improvement thereon and the furnishing of materials and labor pursuant to the provisions of such contract. The lien is not created by the contract of the parties, but is created by statute. Still a contract, express or implied, is essential to the creation of any valid lien under the statute. *Rittenhouse v. Warren*, 264 Ill. 619-624; *Walsh v. Murphy*, 167 Ill. 228.

The law further is that the lumber or materials furnished must be for some particular piece of property. It cannot be on an open account if a Mechanic's Lien is to be given to enforce payment for the same.

*Hill, et al. v. Bishop, et al.* 25 Ill. 349; *Croskey et al. v. Corey, et al.* 48 Ill. 442; *Dymond, Admr. etc. v. Bruhns, et al.* 101 Ill. App. 425-431.

The evidence on the part of appellee in this case discloses that this lumber and material were furnished on an open account and no sufficient proof was made that the same was used in the building in question.

In *Hill v. Bishop*, 25 Ill. Supra, the Court at page 350 says, "This petition is manifestly insufficient. It shows that the lumber was furnished upon an open general account, and without reference to its being put into any particular building, or even that it should be used in any building. It would have been no violation of the agreement to purchase it, if the material bought had been used in making furniture or any other personal property. Under our statute, no lien could be created upon any premises by such a purchase of lumber."

In view of the foregoing authorities, we are of the opinion and so hold that the evidence in the record wholly fails to sustain the allegations of appellee's bill, and that the Court erred in not dismissing said bill for want of equity. For the reasons above set forth the judgment and decree of the trial Court will be reversed and the cause will be remanded with direction to dismiss said bill for want of equity.

Reversed and Remanded with Directions.

Not to be reported.





IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

MARCH TERM, A. D. 1923

AARON JOHNSON,  
Appellee.

vs.

FEDERAL AUTOMOBILE IN-  
SURANCE ASSOCIATION,  
Appellant.

Appeal from  
Circuit Court  
Hardin County.

APR 20 1923

Robert F. Smith  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

Opinion by BOGGS, P. J.

On July 11th, 1921, Appellant issued a policy of insurance for the term of one year on an automobile owned by appellee described in the application as an Overland touring car, Model year 1919. On October 8th, following, said car was destroyed by fire. Suit was instituted in the Circuit Court of Hardin County by appellee against appellant on said policy of insurance.

To recover for the loss of said car, a jury was waived and a trial was had before the Court resulting in a finding and judgment in favor of appellee for the sum of \$400.00.

To reverse said judgment this appeal is prosecuted. While other assignments of error were made on the record the only grounds relied on by appellant as stated in its written brief and argument is "that the statement as to the age of the car was a warranty and that it was material and that it made the policy absolutely void; and second, if appellee was entitled to a recovery the judgment was excessive.

Counsel for appellant contends that the statement in the application as to the car being a 1919 model was a warranty, material to the risk and that the evidence in the record shows that said statement was not correct, and that the car was a 1916 model. In support of this proposition counsel cite several authorities laying down the legal proposition that statements of this character where made warranties by the policies will void the same if untrue. Appellee does not contend but the law as stated by appellant is correct, but insists that on the record in this case appellant is not in a position to rely on the same for the reason that appellee stated to the agent at the time the application was being written that he did not know the age of the car. Appellee testified that he stated to said agent that he purchased said car from Mr. Ashford; that said agent then suggested that they go to Mr. Ashford and



find out in reference to the model of the car, that they went to Mr. Ashford and that he told said agent in appellant's presence that the car was a 1919 model; and that the agent of his own motion filled out the application stating therein that the car was a 1919 model.

We have examined the record in connection with the question here raised and find that the evidence fully supports the contention of appellee in that regard. This being the state of the record under the law as laid down by the Supreme Courts in this State, the appellant cannot avoid liability on the ground that the policy in question was rendered void on account of the fact that the application did not correctly state the age of the car insured.

In *Scott vs. Bankers Auto Insurance Association*, 224 App. this Court at page 510 says, "If the testimony of appellee to the effect that the agent of appellant examined the automobile in question before the application was taken and that on his examination thereof he filled in the answer with reference to the model of the car be taken as true, then the notice to the agent would be notice to the company and the company would be bound thereby."

We therefore hold that the policy in question was not rendered null and void by reason of said statement in said application with reference to the age of said car.

On the proposition made by counsel for appellant that the verdict in this case is excessive, an examination of the record will disclose that several witnesses who testified on behalf of appellee and who were familiar with said car and had more or less experience with reference to the value of second hand automobiles in that community, placed the value of the car in question at from \$400.00 to \$500.00. The witnesses on the part of appellant with the exception of one were persons who had never seen said car and were undertaking to fix its value simply from its age without reference to whether it had had much use or not. These witnesses fixed its value at from \$50.00 to \$150.00. It was therefore a question for the jury on the evidence as to the value of said car, and unless we are able to say that the verdict of the jury is so excessive that it must have been the result of prejudice or passion, we would not be warranted in reversing the judgment on account of the size of the verdict.

It might be further observed with reference to the value of this car that the agent who took the application and issued said policy examined the car at the time the application was signed and issued a policy thereon and insured the same for the sum of \$400.00. This policy was issued in the July preceding the October in which the car was burned.

The jury would therefore have a right to take this circumstance into consideration with the other evidence in the case in arriving at the amount of their verdict. Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Affirmed.

Not to be reported.





IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

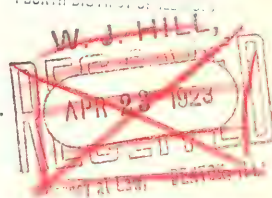
MARCH TERM, A. D. 1923

AARON JOHNSON,  
Appellee.

vs.

FEDERAL AUTOMOBILE IN-  
SURANCE ASSOCIATION,  
Appellant.

Appeal from  
Circuit Court  
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Opinion by BOGGS, P. J.

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To recover for the loss of said car, a jury was waived and a trial was had before the Court resulting in a finding and judgment in favor of appellee for the sum of \$400.00.

To reverse said judgment this appeal is prosecuted. While other assignments of error were made on the record the only grounds relied on by appellant as stated in its written brief and argument is "that the statement as to the age of the car was a warranty and that it was material and that it made the policy absolutely void; and second, if appellee was entitled to a recovery the judgment was excessive.

Counsel for appellant contends that the statement in the application as to the car being a 1919 model was a warranty, material to the risk and that the evidence in the record shows that said statement was not correct, and that the car was a 1916 model. In support of this proposition counsel cite several authorities laying down the legal proposition that statements of this character where made warranties by the policies will void the same if untrue. Appellee does not contend but the law as stated by appellant is correct, but insists that on the record in this case appellant is not in a position to rely on the same for the reason that appellee stated to the agent at the time the application was being written that he did not know the age of the car. Appellee testified that he stated to said agent that he purchased said car from Mr. Ashford; that said agent then suggested that they go to Mr. Ashford and



find out in reference to the model of the car, that they went to Mr. Ashford and that he told said agent in appellant's presence that the car was a 1919 model; and that the agent of his own motion filled out the application stating therein that the car was a 1919 model.

We have examined the record in connection with the question here raised and find that the evidence fully supports the contention of appellee in that regard. This being the state of the record under the law as laid down by the Supreme Courts in this State, the appellant cannot avoid liability on the ground that the policy in question was rendered void on account of the fact that the application did not correctly state the age of the car insured.

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The jury would therefore have a right to take this circumstance into consideration with the other evidence in the case in arriving at the amount of their verdict. Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Affirmed.

Not to be reported.





IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

MARCH TERM, A. D. 1923

*LAUDAN*  
LAUDAN GROCERY CO.,

Appellee.

vs.

C. H. OZIER,

Appellant.

Appeal from  
St. Clair  
Circuit Court.

Opinion by BARRY, J.

Appellee sued to recover the purchase price of a quantity of sugar at seventeen and one-half cents per pound, with interest from Oct. 14, 1919, the date of sale. Appellant pleaded the general issue and also three special pleas in which he averred that the sugar was sold at an unjust and unreasonable price in violation of the Lever Act, etc.

A demurrer was interposed to the special pleas and sustained on the ground that the Lever Act is unconstitutional and void. Appellant strenuously insists that the court erred in so holding and that we should declare it a valid law. We are without jurisdiction to determine the validity of a statute, even a statute of another state. *Drtina vs. Charles Tea Co.*, 281 Ill. 259. By his appeal to this court and the assignment of errors which we may lawfully consider, appellant must be held to have waived or abandoned the question as to the validity of the statute as that question can only be presented to the Supreme Court and on a direct appeal. *Drtina vs. Charles Tea Co. Supra.* It is our duty to hear and determine such errors as are within our jurisdiction and we are without authority to transfer the case to the Supreme Court. *Edwardsville vs. Central Tel. Co.* 302 Ill. 362.

Appellant testified that upon learning that appellee could sell him about 300 bags of sugar he inquired as to the price he would be expected to pay and that when informed it would be seventeen and one-half cents per pound, he replied: "My goodness, Albert, I can't sell sugar for that price; I can't agree to pay seventeen and a half, I can't sell it, but I want the sugar awfully bad. Well, go ahead and send it over, it's all right." In view of this testimony we are at a loss to understand how how he can seriously contend that he did not agree to pay the price demanded. It is true he was dissatisfied, but there is no escape from the conclusion that he accepted the offer and placed his order for the sugar. Even a "grumbling assent"

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FOURTH DISTRICT OF ILLINOIS



is sufficient evidence to establish a contract. *Johnson vs. Federal Union Surety Co.*, 153 N. W. (Mich.) 788.

The record discloses that appellant was promptly furnished with an invoice of the sugar in which he was charged seventeen and one-half cents per pound and that he retained and used the sugar. If no agreement had been made as to the price, as he contends, it was then his duty to refuse to accept the sugar unless he was willing to pay the price demanded, 23 R. C. L. 1278. In *Estey Organ Co. vs. Lehman*, 111 N. W. (Wis.) 1097 the court said: "The defendants having received and retained the property with knowledge of the price plaintiff expected to receive, and without any agreement express or implied for a different price, they cannot escape payment of the price stated in the invoice. *Orme vs. Cooper*, 27 N. E. 655; 1 Ind. App. 449; *Neidig vs. Cole & Pillsbury*, 13 N. W. 18; 13 Neb. 39; *Wellauer vs. Fellows*, 48 Wis. 105; 4 N. W. 114."

Three days after appellant contracted for the sugar and after it was in his possession he wrote appellee that "After due consideration, I have come to the conclusion that I can not possibly pay you the price that you charged me for sugar, etc." The court did not err in refusing to allow that letter to go to the jury. The evidence clearly shows that the sugar was purchased at a stipulated price. That being true the court properly refused to allow appellant to offer proof as to the market value, nor was it material or proper to show what the sugar cost appellee.

All the material facts in this case were admitted by appellant and the court would have been fully justified in directing a verdict in favor of appellee. The verdict is right under the law and the evidence and for that reason we deem it unnecessary to consider the alleged errors in the giving and refusing of instructions. The judgment is affirmed.

Affirmed.

Not to be reported.





IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

MARCH TERM, A. D. 1923

LAUDAN GROCERY CO.,  
Appellee.

vs.

C. H. OZIER,  
Appellant.

Appeal from  
St. Clair  
Circuit Court.

Opinion by BARRY, J.

Appellee sued to recover the purchase price of a quantity of sugar at seventeen and one-half cents per pound, with interest from Oct. 14, 1919, the date of sale. Appellant pleaded the general issue and also three special pleas in which he averred that the sugar was sold at an unjust and unreasonable price in violation of the Lever Act, etc.

A demurrer was interposed to the special pleas and sustained on the ground that the Lever Act is unconstitutional and void. Appellant strenuously insists that the court erred in so holding and that we should declare it a valid law. We are without jurisdiction to determine the validity of a statute, even a statute of another state. *Drtna vs. Charles Tea Co.*, 281 Ill. 259. By his appeal to this court and the assignment of errors which we may lawfully consider, appellant must be held to have waived or abandoned the question as to the validity of the statute as that question can only be presented to the Supreme Court and on a direct appeal. *Drtna vs. Charles Tea Co. Supra.* It is our duty to hear and determine such errors as are within our jurisdiction and we are without authority to transfer the case to the Supreme Court. *Edwardsville vs. Central Tel. Co.* 302 Ill. 362.

Appellant testified that upon learning that appellee could sell him about 300 bags of sugar he inquired as to the price he would be expected to pay and that when informed it would be seventeen and one-half cents per pound, he replied: "My goodness, Albert, I can't sell sugar for that price; I can't agree to pay seventeen and a half, I can't sell it, but I want the sugar awfully bad. Well, go ahead and send it over, it's all right." In view of this testimony we are at a loss to understand how he can seriously contend that he did not agree to pay the price demanded. It is true he was dissatisfied, but there is no escape from the conclusion that he accepted the offer and placed his order for the sugar. Even a "grumbling assent"

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CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



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All the material facts in this case were admitted by appellant and the court would have been fully justified in directing a verdict in favor of appellee. The verdict is right under the law and the evidence and for that reason we deem it unnecessary to consider the alleged errors in the giving and refusing of instructions. The judgment is affirmed.

Affirmed.

Not to be reported.





IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

MARCH TERM, A. D. 1923

BERTHA WEINEL, et al.,  
Appellees.

vs.

BERT J. AXLEY,  
Appellant.

Appeal from  
Monroe  
Circuit Court.

APR 20 1923

Robert B. Rice  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

Opinion by BARRY, J.

Upon the trial of an action of forcible entry and detainer, before the court without a jury, appellee recovered possession of certain real estate. The evidence shows, beyond question, that appellant had no defense upon the merits. He now asks a reversal upon points that were never raised before the Justice of the Peace or the Circuit Court. He contends that the court was without jurisdiction because it does not appear from the record that a complaint was filed with the Justice who issued the summons. He contends that the complaint shown in the transcript was filed with a Justice other than the one who issued the summons. If such facts are disclosed by the record it was the duty of appellant to show them in the abstract. He will not be heard to complain of errors that do not appear in the abstract. The transcript from the Justice to the Circuit Court is abstracted as follows: "Transcript on appeal from the Justice of the Peace to the Circuit Court, executed by John M. Burkhardt, a police magistrate, on the 24th day of August, 1922. Endorsed; Filed 25th of Aug. 1922. Louis A. Weihl, Circuit Clerk."

The said transcript from the Justice may contain sufficient recitals to show that there was a proper complaint filed with the Justice who issued the summons. *Hawthorn vs. The Cartier Lumber Co.*, 121 App. 494. Courts will go to the record to find reasons for supporting a proper judgment but not for the purpose of reversal.

The abstract shows that appellees signed a proper complaint in writing which was addressed to a Justice who did not issue the summons but there is no positive showing that it was filed with any Justice, nor does the law require that it should have been marked filed by the Justice to whom it was presented. *Reynolds vs. Gage*, 91 Ill. 125. That complaint is certified to this court as a part of the proceedings in this case



and it is a fair inference that it was filed with the Justice who issued the summons. The statute does not require that the complaint shall be addressed to or that it shall contain the name of a Justice, but simply provides that on filing a complaint in writing with a Justice he shall issue summons. The objection is without merit. *Hawthorn vs. The Cartier Lumber Co.* 121 App. 494; *Lieferman vs. Osten*, 167 Ill. 93; *Gibbs vs. Van Derslice*, 134 App. 183.

We are also of the opinion that the premises were reasonably and sufficiently described in the complaint and summons and that the court did not err in awarding appellee possession of that part of the premises to which they were entitled under the law and the evidence. If appellant desired a finding and judgment of not guilty as to the remainder of the premises and an apportionment of the costs he should have requested the court for such relief. The notice to terminate the tenancy was in due form and served in ample time prior to the commencement of this suit. Finding no reversible error in the record the judgment is affirmed.

Affirmed.

Not to be reported.





IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

MARCH TERM, A. D. 1923

BERTHA WEINEL, et al.,  
Appellees.

vs.

BERT J. AXLEY,  
Appellant.

Appeal from  
Monroe  
Circuit Court.

Opinion by BARRY, J.

Upon the trial of an action of forcible entry and detainer, before the court without a jury, appellee recovered possession of certain real estate. The evidence shows, beyond question, that appellant had no defense upon the merits. He now asks a reversal upon points that were never raised before the Justice of the Peace or the Circuit Court. He contends that the court was without jurisdiction because it does not appear from the record that a complaint was filed with the Justice who issued the summons. He contends that the complaint shown in the transcript was filed with a Justice other than the one who issued the summons. If such facts are disclosed by the record it was the duty of appellant to show them in the abstract. He will not be heard to complain of errors that do not appear in the abstract. The transcript from the Justice to the Circuit Court is abstracted as follows: "Transcript on appeal from the Justice of the Peace to the Circuit Court, executed by John M. Burkhardt, a police magistrate, on the 24th day of August, 1922. Endorsed; Filed 25th of Aug. 1922. Louis A. Weihl, Circuit Clerk."

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APR 20 1923

Robert B. Hoot  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILL.



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Affirmed.

Not to be reported.





Term No. 17.

IN THE

Agenda No. 10.

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

October Term A.D.1922.

MAY 7 1923

Bessie A. Powell, Executrix  
of the Last Will of Alfred  
E. Powell, deceased,

vs.

Appellee.

The Mutual Life Insurance  
Company of New York,

Appellant.

Appeal from

Circuit Court

Randolph County,

Illinois.

Per Curiam:

Alfred E. Powell, deceased, obtained from the Mutual Life Insurance Co. of New York, a policy of insurance dated the 27th, day of October 1919, insuring his life in favor of his estate for the sum of \$5000.00. The insured, died October 26, 1921 and suit was brought by Bessie A. Powell, executrix of the deceased's estate, on February 21, 1922.

The declaration contains a verbatim copy of the policy issued, together with the written statements made by the insured in his application for said policy. The policy contained the following clause: "This policy shall be incontestable after two years from its date of issue except for nonpayment of premiums."

Three special pleas were filed by appellant on March 6, 1922. These Pleas set up the statements made by Alfred E. Powell, the insured, in his application for said policy, and averred that these answers were material, false and fraudulent and were known to be so by the insured; that appellant on Dec. 2, 1920, discovered that a fraud had been perpetrated upon it and immediately notified him by a letter delivered to him under that date that it had canceled said policy upon the ground of such

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false and fraudulent statements and it tendered therewith all the premiums, together with interest thereon, from the date of payment down to the date of tender, demanding a return of the policy. Siad pleas further aver that the tender was refused by the insured and the appellant by its pleas again tendered the premiums, together with interest thereon, to the executrix. Appellee filed a general and special demurrer to these pleas of the appellant upon the ground that the incontestability clause in the policy precluded the appellant from making the defense therein contained and the court sustained the demurrer. Appellant having elected to stand by its pleas, judgment was entered against it for \$5068.75 whereupon appellant appealed to this court for a reversal of that judgment.

The defense of the appellant as stated in its brief, rests upon "a repudiation, rescission and termination of the contractual relations between it and the insured within the two-year period and upon the ground that the action taken by it constituted a sufficient contest in law to satisfy the incontestability provision contained in the policy."

The questions raised and argued on this record, in effect, are the same as were raised and argued in Powell, appellee vs. The Mutual Life Insurance Company of New York, Appellant, Term No. 14, decided by us at this term. For the reasons stated in the opinion in said cause, the judgment herein is affirmed.

Judgment Affirmed.

Not to be reported in full.





Term No. 16.

In The

Agenda No. 9.

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

October Term A. D. 1922.

FILED

MAY 7 1923

Robert B. Roy  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

Bessie A. Powell,  
Appellee.

vs.

The Mutual Life Insurance  
Company of New York,  
Appellant.

Appeal from

Circuit Court

Randolph County,  
Illinois.

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Per Curiam:

Alfred E. Powell, deceased, obtained from the Mutual Life Insurance Company of New York, a policy of insurance dated the 23th, day of April 1919, insuring his life for the sum of three thousand dollars. The insured died October 26, 1921, and suit was brought by Bessie A. Powell, the beneficiary, who was also the administratrix of the deceased's estate, on February 21, 1922

The declaration contains a verbatim copy of the policy issued, together with the written statements made by the insured in his application for said policy. The policy contained the following clause: "This policy shall be incontestable after two years from its date of issue except for non payment of premiums."

Three special pleas were filed by appellant on March 6, 1922. These pleas set up the statements made by Alfred E. Powell, the insured, in his application for said policy and averred that these answers were material, false and fraudulent and were known to be so by the insured; that appellant on Dec. 2, 1920, discovered that a fraud had been perpetrated upon it and immediately notified him by a letter delivered to him under that

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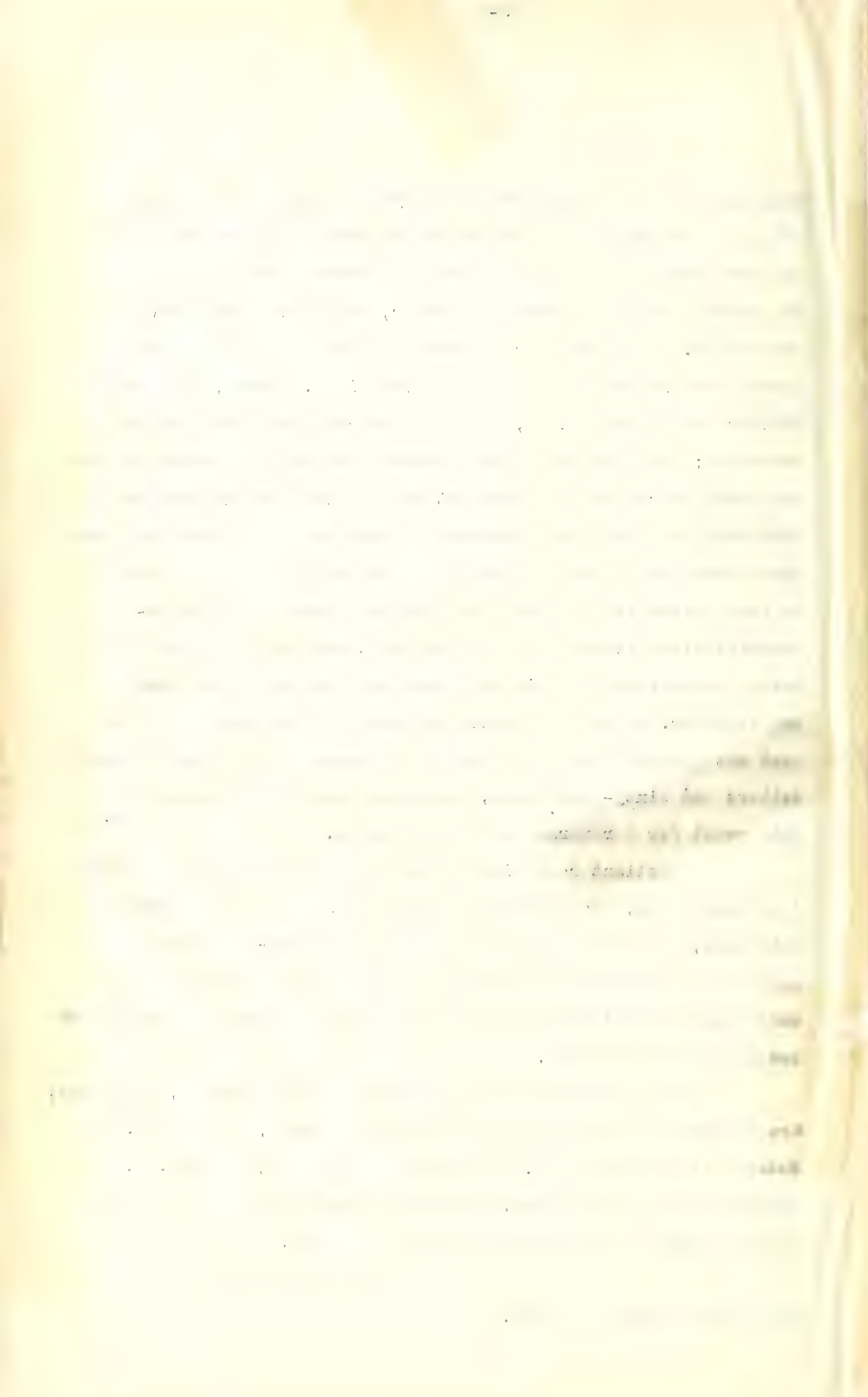
date that it had canceled said policy upon the ground of such false and fraudulent statements and it tendered therewith all the premiums, together with interest thereon, from the date of payment down to the date of tender, demanding a return of the policy. Said pleas further aver that on the same date a letter was written and delivered to Bessie A. Powell, the beneficiary under the policy, which letter contained the same information; that the tender was refused both by the insured and by the beneficiary and the appellant by its pleas again tendered the premiums, together with interest thereon, to the beneficiary, the administratrix. Appellee filed a general and special demurrer to these pleas of the appellant upon the ground that the incontestability clause in the policy precluded the appellant from making the defense therein contained and the court sustained the demurrer. Appellant elected to stand by its pleas and judgment was entered against it for two thousand eight hundred sixty dollars and sixty-five cents, whereupon appellant appealed to this court for a reversal of that judgment.

Appellant rests its defense as stated in its brief upon "a repudiation, rescission and termination of the contractual relations, between it and the insured within <sup>the</sup> two-year period and upon the ground that <sup>the</sup> action taken by it constituted a sufficient contest in law to satisfy the incontestability provision contained in the policy."

The questions raised and argued on this record, in effect, are the same as were raised and argued in Powell, appellee v. The Mutual Life Insurance Co. of New York, appellant, Term No. 14, decided by us at this term. For the reasons stated in the opinion in said cause, the judgment herein is affirmed.

Judgment Affirmed.

Not to be reported in full.





Term No. 15

In The  
Appellate Court of Illinois.

Fourth District,

October Term, A.D. 1922.

Le Roy D. Powell, Appellee.

vs

The Mutual Life Insurance  
Company of New York,

Appeal from Circuit Court  
of  
Randolph County.

Per Curiam:

Alfred M. Powell, deceased, obtained from the Mutual Life Insurance Company of New York, a policy of insurance, dated the 13th day of May, 1919, insuring his life for the sum of \$3000.00. The insured died October 26th, 1921, and suit was brought by Le Roy D. Powell, the beneficiary, on February 21st, 1922.

The declaration contains a verbatim copy of the policy issued, together with the written statements made by the insured in his application for said policy. The policy contained the following clause: "This policy shall be incontestable after two years from its date of issue except for nonpayment of premiums."

Three special pleas were filed by appellant on March 6, 1922. These Pleas set up the statement made by Alfred M. Powell, the insured, in his application for said policy and averred that these answers were material, false and fraudulent and were known to be so by the insured; that appellant on December 2nd, 1920, discovered that a fraud had been perpetrated upon it and immediately notified him by a letter delivered to him under that date that it had canceled said policy upon the ground of such false and fraudulent statements and it tendered therewith all the premiums, together with interest thereon, from the date of payment down to the date of tender, demanding a return of the policy. Said pleas further aver that on December 16th, 1920 a letter was written and delivered to Le Roy D. Powell, the beneficiary under the policy,



which later obtained the same result; and the court refused such by the insured and by the beneficiary and the appellant by its pleas again tendered the premiums, together with interest thereon, to the beneficiary. Appellee filed a general and specific demurrer to these pleas of the appellant upon the ground that the incontestability clause in the policy precluded the appellant from making the defense therein contained and the court sustained the demurrer. Appellant elected to stand by its pleas and judgment was entered against it for \$2861.05, whereupon appellant appealed to this court for a reversal of the judgment.

Appellant rests its defense as stated in its brief upon "a repudiation, rescission and termination of the contractual relations between it and the insured within the two-year period and upon the ground that the action taken by it constituted a sufficient contest in law to satisfy the incontestability provision contained in the policy."

The questions raised and argued on this record, in effect, are the same as were raised and argued in *Powell, Appellee v. The Mutual Life Insurance Company of New York, Appellant*, Term No. 14, Agenda No. 7, decided by us at this term. For the reasons stated in the opinion in said cause, the judgment herein is affirmed.

Judgment Affirmed.

Not to be reported in full.

1. The first part of the document is a list of names and their corresponding addresses. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list is organized into two columns, with names on the left and addresses on the right.

2. The second part of the document is a list of names and their corresponding addresses. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list is organized into two columns, with names on the left and addresses on the right.

3. The third part of the document is a list of names and their corresponding addresses. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list is organized into two columns, with names on the left and addresses on the right.

4. The fourth part of the document is a list of names and their corresponding addresses. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list is organized into two columns, with names on the left and addresses on the right.

5. The fifth part of the document is a list of names and their corresponding addresses. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list is organized into two columns, with names on the left and addresses on the right.

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